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State of Utah v. James Lewis Green : Brief of Appellant

Utah Court of Appeals

Paul Van Dam; Attorney General; Attorney for Plaintiff and Respondent.
Daniel R. Knowlton; Attorney for Defendant and Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Respondent, vs. JAMES LEWIS GREEN, AKA JAMES ALVIN DOUGLAS, Defendant and Appellant.	Case No. 890222-CA Category No. 2

APPELLANT'S BRIEF

Appeal from final judgment and sentence of the First Judicial District Court in and for Box Elder County, State of Utah, Honorable GORDON J. LOW, Judge, Presiding

DANIEL R. KNOWLTON, USB 5180
214 Tenth Avenue
Salt Lake City, Utah 84103

Attorney for Defendant
and Appellant

PAUL VAN DAM
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Plaintiff and Respondent

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APPELLANT'S BRIEF

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a final judgment and sentence of the Court below from two second degree felony crimes, manufacturing a controlled substance, and possession of a controlled substance with intent to distribute, P-2-P. Jurisdiction of this Court is therefor conferred by Rule 26, Utah Rules of Criminal Procedure, and Section 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

POINT I:

THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT WAS IMPROPERLY ADMITTED INTO EVIDENCE AS OBTAINED BY ILLEGAL SEARCH AND SIEZURE, BASED ON LACK OF PROBABLE CAUSE FOR THE SEARCH WARRANT

POINT II:

EVIDENCE DISCOVERED IN THE SEARCH SHOULD BE SUPPRESSED BASED ON ILLEGAL SEARCH AND SIEZURE SINCE SEARCHING PARTY WAS A GOVENMENT EMPLOYEE OR AGENT, OR WAS ACTING IN SUCH A WAY AS TO BE DEEMED A GOVERNMENT AGENT

POINT III:

THE DESTRUCTION OF EVIDENCE BY THE STATE DEPRIVED DEFENDANT OF DUE PROCESS, A FAIR TRIAL, AND OPPORTUNITY TO PROVE HIS DEFENSES

POINT IV:

THE AUTHORITY GIVEN THE U.S. CONGRESS OR U.S. ATTORNEY GENERAL UNDER THE UTAH CONTROLLED SUBSTANCES ACT TO DESIGNATE, RESCHEDULE, OR REVISE BY ADDING, DELETING, OR TRANSFERING SUBSTANCES ON THE SCHEDULES IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

POINT V:

THE AUTHORITY GIVEN THE U.S. CONGRESS OR U.S. ATTORNEY GENERAL UNDER THE UTAH CONTROLLED SUBSTANCES ACT TO DESIGNATE, RESCHEDULE, OR REVISE BY ADDING, DELETING, OR TRANSFERING SUBSTANCES ON THE SCHEDULES IS A DEPRIVATION OF DEFENDANT'S DUE PROCESS RIGHTS TO REASONABLE NOTICE OF PROSCRIBED CONDUCT

POINT VI:

THE COURT ERRED IN FAILING TO GIVE THE JURY INSTRUCTION THAT THE STATE HAD THE BURDEN OF PROVING THE PROPRIETY OF THE ADMINISTRATIVE PROCEDURE FOR SCHEDULING THE TO-BE-CONTROLLED SUBSTANCE

STATEMENT OF THE CASE

Defendant was charged by way of information with various drug offenses, and was convicted, after a jury trial, of manufacturing a controlled substance, to wit, P-2-P, a second degree felony, and possession of a controlled substance with intent to distribute, to wit, P-2-P, a second degree felony.

Andre Pommier testified at the hearing to suppress evidence that he was a general contractor (see Reporter's Transcript of Motions to Suppress, p. 89, January 18, 1989, hereinafter "S"). In addition, at the time of the events in this case, he worked for the Brigham City Fire Department as an EMT (S 96, 101), as a volunteer paid $7.50 per hour (S 96), paid from public funds (S 100) and had, since October of 1987, during periods while working doing carpentry work for Defendant on Defendant's house, been the Assistant Fire Marshall (S 100). At the work site, at Defendant's house, he wore a beeper, and after October, 1987, often carried a police radio to the work site at Defendant's home (S 98, 99). As a fireman, Pommier had worked with the police a lot of times when they were on scene for traffic control and fires (S 117) at various locations. If fact, after the issuance of the search warrant, when the police were searching the premises pursuant to the search warrant, Mr. Pommier himself was at the search site acting in the paid (S 127) capacity of Fire Chief (S 124), in charge of the Fire Department involvement in the search (S 125).

Mr. Pommier started working for Defendant in the end of January, 1987 (S 90). In the summer of 1987, Mr. Pommier was doing various construction work at the home of the defendant (S

91-92). Mr. Pommier testified that there was as part of Defendant's house a locked garage Mr. Pommier had no authority to enter (S 104). The windows to the garage had blinds closed on them (S 106). In the summer of 1987 Mr. Pommier testified he found a key, on a 2x4 on an atrium he was demolishing (S 91), and tried it in the lock to the garage. On finding that it worked, he took the key, surreptitiously had a duplicate made (S 92), and the next day returned the original key to the defendant (107-108), never telling Defendant that he had made a copy (S 115). He then picked a time when the defendant was not present (S 108) and broke into the garage. On at least five other occasions, ending in March of 1988, he again admitted to having broken into the garage of the defendant without any authority to do so, and against the expressed and known wishes of the defendant (S 94, 114).

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Mr. Pommier testified that he never stole anything from the premises, nor took anything other than the key from the defendant (S 105). He further testified that he took his actions merely out of "curiosity" (S 93), and at least at one point was concerned about some water that was coming out of the closed garage (Sl 120). He also testified that he was aware by his personal knowledge that the home had, just prior to being purchased by the defendant, been owned by Mr. Bob Wendell, who he knew for many years was a high school chemistry professor (S 109).

Mr. Pommier testified that on approximately April 22, 1988, he quit his employment with the defendant (S 116). He then testified that his "guilty conscience" (S 95) got the better of him, and in the latter part of June, 1988, went to his co-fireman on the Fire Department (S 47-48), Detective Yeates, a Sheriff, to tell him of his suspicions and information with regard to what was contained in the garage.

Defendant testified he'd disallowed Mr. Pommier any access to the garage, or the house while he was away (S 139), and which garage was kept locked. Further, Defendant testified Mr. Pommier had been fired from his employment the end of April, 1987, as a result of Mr. Pommier stealing money from Defendant's house (S 140). Defendant told Mr. Pommier that Mr. Douglas might have to go to the police about the theft. (S 140).

Defendant testified Mr. Pommier told him during his employment that Mr. Pommier was the Assistant Fire Marshal, and at another point, the Acting Fire Marshal (p. 142). Mr. Pommier had told Defendant he'd have to leave, and did leave, the

premises occasionally to make fire inspections (S 142). Mr. Pommier normally carried a police radio with him on the job at Defendant's house, tuned-in so one could hear the chatter on the band (S 142).

Box Elder County Sheriff Detective Lynn Yeates was called to testify. He testified that he and Mr. Pommier were both workers on the ambulance, for the Brigham City Fire Department, Ambulance (S 77). About June 27, 1988, Mr. Pommier met him on the street and told him he thought there was "something wrong" (S 81) up at a house in Perry, Utah, Defendant's house. He said at the house were containers of ether, chloroform, sodium acetate, sulfuric acid, and something else the witness couldn't remember (S 82). Detective Yeates took this information to Detective Johnson.

Deputy Sheriff, Detective Mike Johnson testified that the "confidential informant" in the Affidavit Requesting Issuance of Search Warrant (Appendix 1-7) was Mr. Pommier. The trial court, at the suppression hearing, acknowledged it had before it the signed original search warrant, the signed Affidavit aforesaid, and the Deposition and Affidavit of Mike Johnson (Appendix 8-10). Detective Johnson met with Mr. Pommier on June 29, 1988 (S 47) and reviewed a book with pictures of chemical equipment, and Mr. Pommier identified some of the items he said he saw in the garage (S 40). Later, Mr. Johnson executed the Affidavit and the Deposition and Affidavit, and the court executed the Search Warrant (Appendix 11-12). The affidavits and search warant were signed about September 14, 1988. The search warrant was executed on the residence on about September 15, 1988 (Reporter's Trial

Transcript vol. 1, hereinafter "R1", p. 55), at which time Defendant was taken into custody.

Detective Yeates was in charge of the evidence seized at the home of the defendant pursuant to the search warrant issued by Judge Daines (S 10). Detective Yeates testified that there were 80 to 100 chemicals seized and present at the home (S 15). Further, there were greater than a hundred different batches of chemicals stored at the defendant's home. Some of these were in their original containers, including shipping containers (S 15), while others were in unmarked packages (S 15). Detective Yates testified that he assisted the D.E.A. chemist (S 11) (Mr. Chuck Hall, a forensic chemist with the Drug Engorcement Administration), in the taking of samples. He testified that they took twelve or thirteen samples among all the chemicals (S 11). Further, Mr. Hall determined the amount and which chemicals were to be sampled (S 17).

Detective Yates was informed by Chuck Hall that the chemicals could constitute a hazard and that all of the items should be destroyed (S 12, R1 124, 90-1). Part of this was because of a white powder of unknown substance which was in copious quantities and covered much of the interior of the garage where the chemicals were found (R1 102). Based upon that, Detective Yeates had all of the chemicals, except for the twelve to thirteen samples, destroyed or disposed of (S 12, 13).

Mr. Chuck Hall was called to testify with regard to the chemicals. He is a forensic chemist for the Drug Enforcement Administration, having received a bachelors degree in chemistry in 1961 (S 22).

Mr. Hall testified that there were over 100 containers of different chemicals, some of them still in their original containers (S 27). Further, Defendant testified there were thousands of items there in the garage where samples were taken (Reporter's Transcript of Trial, Volume 2, hereinafter "R2" 495). In addition, there were large amounts of chemicals in a storage room in the house, but they did not take any samples from said storage room.

Defendant testified at trial his father had been a licensed pharmacist (R2 476), that Defendant had a lifelong hobby of raising tropical plants (R2 478), fertilized, sprayed, and added nutrients to the soil (R2 479). He had a collection of chemicals to pursue his chemistry hobby (R2 495). He dabbled in making sprays, plant growth hormone, and 20 to 30 other projects (R2 495). He made solar feed, fertilizer, ammonium phosphate compounds, and materials to change p.h. of the soil (R2 500). He had worked in the past at jobs where he sold chemicals, and had been an officer in a chemical company (R2 499).

Mr. Hall recommended that they take small parts of "key" chemicals for analysis, and had Detective Yates help him with those samples (S 11). His testimony was that those samples were approximately 1 ounce in size (S 30). However, no sample was taken of the white substance that appeared to cover everything (S 29).

He then testified that all of the chemicals except for the samples were potentially hazards, and that they should be destroyed. This was notwithstanding the fact that many of them were in sealed and original containers, including shipping

containers, which would pass without objection in interstate travel (S 26). Further, with regard to which chemicals were kept or sampled, no further bases or foundation or test was testified to other than what he deemed might be "key" chemicals.

SUMMARY OF ARGUMENT

POINT I:

THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT WAS IMPROPERLY ADMITTED INTO EVIDENCE AS OBTAINED BY ILLEGAL SEARCH AND SIEZURE, BASED ON LACK OF PROBABLE CAUSE FOR THE SEARCH WARRANT

The affidavits supporting the issuance of the search warrant stated no percipient evidence of the existence of illegal drugs, nor of any activities other than legal ones. False statements were made in the affidavits which must be excised, and information unrevealed in the affidavit has to be taken into consideration. The informant was not reliable, and the warrant was based on information overly stale.

POINT II:

EVIDENCE DISCOVERED IN THE SEARCH SHOULD BE SUPPRESSED BASED ON ILLEGAL SEARCH AND SIEZURE SINCE SEARCHING PARTY WAS A GOVENMENT EMPLOYEE OR AGENT, OR WAS ACTING IN SUCH A WAY AS TO BE DEEMED A GOVERNMENT AGENT

The informant's actions in breaking into Defendants garage six times constituted actions of a government entity or sovereign for purposes of search and siezure; first, his Government function covered the type of actions and investigations he undertook in this case, and, second, he was acting with the state of mind and with the type of actions conducive to being deemed to be acting as a Governmental agent in connection with the investigation.

POINT III:

THE DESTRUCTION OF EVIDENCE BY THE STATE DEPRIVED DEFENDANT OF DUE PROCESS, A FAIR TRIAL, AND OPPORTUNITY TO PROVE HIS DEFENSES

Since the State destroyed a large quantity of chemicals after selectively sampling only a few, instead of preserving the evidence or sampling all chemicals, it deprived Defendant of exonerating evidence in a constitutionally material way, to his prejudice before the jury.

POINT IV:

THE AUTHORITY GIVEN THE U.S. CONGRESS OR U.S. ATTORNEY GENERAL UNDER THE UTAH CONTROLLED SUBSTANCES ACT TO DESIGNATE, RESCHEDULE, OR REVISE BY ADDING, DELETING, OR TRANSFERING SUBSTANCES ON THE SCHEDULES IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Utah has forbidden the delegation to others of the legislative right to proscribe what drugs shall be controlled substances. Furthermore, to delegate to the Congress or the U.S. Attorney General the power to create felony crimes, and fix punishments therefor, is an unconstitutional delegation of legislative power, and to allow that delegation to occur in the future, prospectively, is especially improper.

POINT V:

THE AUTHORITY GIVEN THE U.S. CONGRESS OR U.S. ATTORNEY GENERAL UNDER THE UTAH CONTROLLED SUBSTANCES ACT TO DESIGNATE, RESCHEDULE, OR REVISE BY ADDING, DELETING, OR TRANSFERING SUBSTANCES ON THE SCHEDULES IS A DEPRIVATION OF DEFENDANT'S DUE PROCESS RIGHTS TO REASONABLE NOTICE OF PROSCRIBED CONDUCT

The method used in the Utah Controlled Substance Act purportedly delegating to and enabling the U.S. Attorney General to add, delete, and reschedule drugs from the schedules, requires a person to constantly review the Federal Register and Code of Federal Regulations, and is unduly confusing, and in constant flux. As a result, the statute fails to give reasonable notice of proscribed conduct to a person of average intelligence.

POINT VI:

THE COURT ERRED IN FAILING TO GIVE THE JURY INSTRUCTION THAT THE STATE HAD THE BURDEN OF PROVING THE PROPRIETY OF THE ADMINISTRATIVE PROCEDURE FOR SCHEDULING THE TO-BE-CONTROLLED SUBSTANCE

Defendant requested an instruction to the jury outlining that the State had the burden of proving proper compliance with administrative requirements on the part of the U.S. Attorney General in adding P-2-P to the federal list of controlled substances. The denial of the instruction was error.

ARGUMENT

POINT I:

THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT WAS IMPROPERLY ADMITTED INTO EVIDENCE AS OBTAINED BY ILLEGAL SEARCH AND SIEZURE, BASED ON LACK OF PROBABLE CAUSE FOR THE SEARCH WARRANT

The evidence gathered as a result of the search pursuant to the search warrant, chemical samples, appartus, equipment, etc. papers, and observations, should be suppressed. There was no probable cause to support the issuance of the warrant. This is based upon the allegations as set forth in the affidavit, the separate and related ground that the false statements contained in the affidavit need to be excised, and after they are excised, there is clearly not probable cause for the issuance of a search warrant, and finally that the evidence is sufficiently stale and there is no evidence that it was current, to justify a finding of probable cause as of the date of issuance.

The Utah Supreme Court has discussed and set forth the standard with regard to the requirements of affidavits to support a search warrant in the case of State v. Hansen, 732 P.2d 127 (Utah 1987). The Court stated, at page 130:

> "Search warrant affidavits are to be construed in a common-sense, reasonable manner. State v. Williamson, 674

> P.2d 132, 133 (Utah 1983); State v. Pursell, 586 P.2d 441 (Utah 1978). Excessive technical dissection of an informant's tip or of the nontechnical language in the officer's affidavit is ill-suited to this task. (Illinois v. Gates) 462 U.S. at 231-32, 235-36, 103 S.Ct. at 2328-30, 2330-31. In Gates, the Supreme Court emphasized that an informant's "reliability" and "basis of knowledge" are but two relevant considerations, among others, in determining the existence of probable cause under "a totality-of-the-circumstances." 462 U.S. at 231-32, 235-36, 103 S.Ct. at 2328-30, 2330-31. They are not strict, independent requirements to be "rigidly exacted" in every case. A weakness in one or the other is not fatal to the warrant so long as in the totality there is substantial basis to find probable cause. Id. at 230, 238, 103 S.Ct. at 2328, 2332. The indicia of veracity, reliability, and basis of knowledge are nonexclusive elements to be evaluated in reaching the practical, common-sense decision whether, given all the circumstances, there is a fair probability that the contraband will be found in the place described."

The United States Supreme Court, as well as the Utah Supreme Court, has rejected as hypertechnical the old Aguilar-Spinelli two-pronged test which required separate and technical requirements of showing separately that the informant's tips set out the underlying circumstances 1) to reveal the basis of the knowledge, and 2) to establish the veracity or reliability. The Court thus looks at those issues of basis, knowledge and reliability in order to be able to conclude that probable cause existed. As stated in State v. Bailey, 675 P.2d 1203 (Utah 1984), a case again decided after the rejection of the technical requirements of Aguilar-Spinelli, at page 1205:

> "However, even under this standard, compliance with the Aguilar-Spinelli guidelines may be necessary to make a sufficient basis for probable cause. Depending on the circumstances, a showing of the basis of knowledge and veracity or reliability of the person providing the information for a warrant may well be necessary to establish with a fair "probability" that the evidence sought actually exists and can be found where the informant states."

It is respecfully submitted that that burden cannot be established in connection with the affidavit filed herein. As noted in the recitation of facts, all of the chemicals possessed, as well as chemicals set forth in the affidavit (Appendix 1-7), are themselves lawful to possess, and no presumption of illegality can occur from their mere possesion. There are two attempts to provide probable cause that a crime had been committed and there was evidence of a crime at the defendant's residence, neither one of which is sufficient, pursuant to Bailey, to support a probable cause finding. With regard to the statements of the confidential informant, the statement "there is a clandestine-type lab producing an illegal substance" is without any foundation as to his knowledge or ability to perceive those items ("clandestine", "illegal substance"), let alone his ability to conclude that that is what is going on. There are no statements setting forth that the confidential informant, Mr. Pommier, has any experience or knowledge concerning chemistry or the manufacture of illegal substances. Thus, there is absolutely no basis or foundation showing his knowledge, veracity or reliability as to the existence of a clandestine-type lab.

The other matters as set forth in the affidavit were a conversation between Detective Yeates and Art Turkelson, a criminologist. Detective Johnson alleges in the affidavit, paragraph 16(a), that based upon the description of the equipment and glassware, which neither Yeates nor Turkelson had seen, and the named chemicals, being four completely legal chemicals, that it was "consistent with the type of equipment and chemicals used to produce methamphetamine or a substance known as phenyl-2-

propanone." There is nothing, however, to indicate that it is inconsistent with any other use, or to in any manner tie the defendant in with any illegal activities, let alone drug activities. In the affidavit, they allege he does not have a license to produce controlled substances, but there is no information or belief that he has any history of drug involvement, any knowledge or skills concerning production of illegal substances, or any desire to. Further, again there is a problem with regard to the basis of knowledge and the conclusion drawn in that Turkelson is apparently saying that the existence of five named chemicals out of many others that are unnamed, and equipment which a non-technical trained person has listed and described, would be the basis for the reasonable conclusion and fair probability that this otherwise respectable citizen, innocent, with no further indicia of criminal activity, is engaged in the production of a controlled substance. Further, there is no way that the possession of the four chemicals listed, which are legal to have, could support probable cause to believe that controlled substances being produced--otherwise all Chemical Companies would of course be subject to search at any time. Furthermore, the search warrant authorized the search for illegal drugs at a certain home, as well as the person of James Douglas. Therefore, looking at the totality of circumstance, there is a lack of probable cause; the search warrant was invalid, and the evidence must be excluded.

In addition to the above, there is a problem with regard to two direct misstatements in the affidavit, which must be excised from the affidavit prior to consideration as to probable cause.

As noted in Hansen, id., at page 130, "A warrant may be invalid if the supporting affidavit contains a misstatement which 'materially affects the findings of probable cause.'(Citation omitted.)" That is required as a matter of constitutional law if there is a false statement, it should be at a minimum excised from the warrant. See State v. Nielsen, 727 P.2d 188 (Utah 1986), and Franks v. Delaware, 98 S.Ct. 2674 (1978). In addition, misstatement by omission would also constitute an improper action, and the true facts from the admission may be required to be read as if in the original affidavit. See State v. Nielsen, id. at 191.

Officer Johnson, Officer Yeates, as well as Mr. Pommier, the confidential informant, all agreed that when Mr. Pommier came to the officers he didn't know what the chemicals were, the purposes therefor, or what was going on, but rather that he just had some suspicions about it (S 82, 138). Thus, the statement in paragraph 4 of the affidavit, that the confidential informant "told your affiant of what he believed to be a clandestine-type lab producing illegal substances located at the residence in Perry" is a direct misstatement. Further, Officer Johnson admitted in his testimony that he was unsure as to whether he supplied the words "clandestine type lab" or whethem Mr. Pommier did (S 137). Therefore, since that is very likely not what Mr. Pommier told the officers, because he did not have any basis and did not know that, that was a misstatement which was put in knowingly, intentionally, and recklessly with regard to its truth, and must be excised. See State v. Nielsen, supra, id.

The second clear misstatement is the statement that the chemicals as set forth in the affidavit would produce a controlled substance known as phenyl-2-propanone. Phenyl-2-propanone (P-2-P) is nowhere mentioned in the Utah Controlled Substance Act with regard to what are controlled substances, although it may be listed in the federal regulations. The Utah Supreme Court disallowed delegation in State v. Gallion, 572 P.2d 683 (Utah 1977). Had the magistrate known this uncertainty about P-2-P, he may well not have issued the warrant.

Finally, there is a factual mattter which was well-known to the officers and the confidential informant, which was obviously intentionally omitted, which should be read in. That fact is that although mentioned in paragraph 4 that the residence "known to your affiant as the Bob Wendell home", it is not mentioned or detailed that Mr. Wendell was, for many years, the high school chemistry teacher, and had just recently sold the house and moved to Arizona. Detective Johnson knew this (S 54). So did Mr. Pommier (S 109). Yet it was not revealed to the Magistrate. Since it is alleged that the existence of chemicals and chemical apparatus is suspicious, the fact that they know the house was recently purchased from a chemistry teacher who, one would naturally assume, would have substantial chemicals and lab equipment stored in his home, would bear on the issue as to the suspicious nature of the items. Therefore, that fact should be read back into the affidavit.

Making those changes, we have a situation where an individual has seen chemicals, the character of which he has no knowledge, and chemistry equipment in a home recently purchased

from a high school chemistry teacher, but is suspicious, that the chemicals and apparatus described are consistent with the production of a controlled and an uncontrolled substance, the affidavit clearly has a different flavor, meaning, and effect, and probable cause evaporates.

The final concern as to the existence of probable cause has to do with the currency of the information set forth in the affidavit. The information is too stale to justify any probable cause, and the State failed, in its affidavit to set forth the matter that the information was timely, current, and that probable cause existed at the time of the execution of the warrant.

The warrant in this case was issued Septemeber 14, 1988, and served the following day. First, as noted in the affidavit, the confidential informant is alleged to have "personally been in the residence on numerous occasions between the dates of January, 1986 and April 22, 1988", the only pertinent times given in the Affidavits. See paragraph 7 of affidavit (Appendix, 3). Second, the confidential informant is alleged to have first met with the officers on June 29, 1988. Although some surveillance occurred after the June date (Appendix 3-7) there is no further information with regard to any allegation of continuing illegal activity, any production of a controlled substance, transporting, sales of other chemicals brought into the house, or anything else. There is nothing to indicate that to the extent that there was any illegal activity going on in April 1988, that it was still continuing and on-going in September 1988, when the search warrant issued.

In United States v. Craig, 674 F Supp 561 (WD La, 1987), it is soundly stated that where the affidavit on which the search warrant is based describes the offense as having occurred within a certain time period but without specifying dates, the court reviewing the question of staleness of information must presume that the transactions took place in the most remote part of the time span, otherwise any ancient evidence could be used by merely describing it as falling within a period of time ending with the current date.

Staleness--and the flip-side, the currency of information--is an essential determination of probable cause. As stated in United States v. McCall, 740 F.2d 1331 (4th Cir. 1984), at pages 1335-6:

> "The Fourth Amendment bars search warrants issued on less than probable cause, and there is no question that time is a crucial element of probable cause. As valid search warrant may issue only upon allegation of "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be dtermined by the circumstances of each case." Consequently, evidence seized pursuant to a warant supported by "stale" probable cause is not admissible in a criminal trial to establish the defendant's guilt."
>
> "Cases in which staleness becomes an issue arise in two different contexts. First, the facts alleged in the warrant may have been sufficient to establish probable cause when the warrant was issued, but the government's delay in executing the warrant possibly tainted the search. Second, the warrant itself may be suspect because the information on which it rested was arguably too old to furnish "present" probable cause."

Further, it would be the State's duty and burden to demonstrate, within the four corners of the affidavit, the currency of the information. In United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979), the case concerned unlawful possession of checks

stolen from the mail. The affidavit and circumstances of the case discussed a receipt of information on October 24, 1976, with regard to the checks and purchases thereof. There was then an undated specification of a conversation, supposedly with the defendant there confirming information of the existence of stolen checks and their location in the house. A search warrant issued on December 15th, 1976. The Court there held that there was not sufficient probable cause based upon the staleness of the information. As stated by the Court at page 1096:

> "Without this date (of the conversation), there is no way for the Magistrate to determine whether the information was sufficiently timely to support the warrant."

In the present case, there is alleged in the affidavit, whether true or not, an over two-year period of when the confidential informant was in the property, January 1986 through April 22, 1988. There is no indication of when the last time he had seen those chemicals or the apparatus on the premises. Thus, it would be just as reasonable to conclude that he only saw them in January 1986 as to him seeing them on April 22, 1988.

In addition, there was nothing to indicate that in September 1988 there was nay continued validity to the information.

It is noted that in State v. Hansen, supra, the Utah Supreme Court said, at 131, "A mere passage of time does not necessarily invalidate the supporting basis for the warrant." However, here we have no indication of when the items were actually seen in the house, and there is no indication of any supporting basis for their continuing to be there. Thus, there is more than the mere

passage of time to destroy the original validity, if any, to the information, and it's existence on September 15, 1988.

Another aspect of the probable cause dilemma is the reliability of the informant. In the case at hand, the police officers had heard the informant admit to secretly copying a key, and breaking in while the owner was away on at least six occasions. Most telling, by his story, he did this over the course of a year without telling the police. The more credible reason for his delay, Officer Johnson should have concluded, was to protect the informant's surrepticious opportunities.

The trial court denied Defendants motion to suppress on this ground, in its Memorandum Decision (Appendix 36, 37).

POINT II:

EVIDENCE DISCOVERED IN THE SEARCH SHOULD BE SUPPRESSED BASED ON ILLEGAL SEARCH AND SIEZURE SINCE SEARCHING PARTY WAS A GOVENMENT EMPLOYEE OR AGENT, OR WAS ACTING IN SUCH A WAY AS TO BE DEEMED A GOVERNMENT AGENT

It is the defendant's position that there are in essence three reasons why any evidence obtained as a result of Mr. Pommier's entry into the defendant's garage should be disallowed as evidence. The first is that Mr. Pommier was a government employee or agent when he conducted the searches. The second corollary argument is that during those searches he was acting as an agent of the government, and therefore the searches also trigger the United States Fourth Amendment sanctions as well as Article I, Section 14 of the State constitutional provisions. Finally, that the illegal actions of Mr. Pommier in and of themselves should bar the use of the evidence.

Mr. Pommier made at least six unauthorized and illegal entries into the garage of the defendant. He acted from his curiosity, his desire to discover what was inside, his concern as to the source of water or other material coming out of the garage, as well as his concern and worry about the storage and containment of the items found therein, his suspicions as to the nature of the circumstances, and finally, for reasons known only to him. These correspond with concerns, issues, and functions in his official capacity with the Brigham City Fire Department.

The Utah Supreme Court, as well as federal courts, have held that the proscriptions of the Fourth Amendment of the United States Constitution, as well as the provisions of Article I, Section 14, Utah Constitution, act as "...a restraint only upon the activities of sovereign authority and is not applicable to the searches and seizures by any persons other than government officers and agents." State v. Watts, 750 P. 2d 1219 (Utah 1988) at 1221. However, such officers and agents are not limited to police officers, but clearly involve other government officials and agencies who have a regulatory function. A classic example would be a school teacher, whose private search of a student triggers Fourth Amendment concerns.

As the Assistant or Acting Fire Marshall, Mr. Pommier's duties would naturally include the investigation and inspection of storage facilities to determine whether or not fire hazards exist, to seek out various arson possibilities and fires, and to perform other regulatory and investigatory functions. His duties in inspecting the garage, based upon his curiosity, suspicions, and the water leaving, therefore, were in performance of those

duties. He admitted he understood his duties to include business and home inspections. The only alternative explanation, rejected by Mr. Pommier, was that he desired to misappropriate things from the premises. Further, he is probably within the definitional provisions of a special function officer under U.C.A. Section 77-1(a)-4 (Appendix 13) as a fire arson investigator. Further, during his investigations as to the storage of the chemicals in the garage, he would be engaged in his duties, therefore a special function officer, and therefore, by definition, a peace officer.

It must also be remembered that there were at least six entries by Mr. Pommier. Even if one were to give Mr. Pommier and the State the benefit of the doubt as to the first entry, where he was concerned about the water, he discovered the water, saw various chemicals, did not repair the water (S 120), and left. His subsequent entry based upon his suspicions and curiosity--especially if triggered by the chemicals, would clearly be because of his knowledge, expertise and concerns for the chemicals, unless the Court believes that he was not truthful when he denied a criminal intent to steal. Therefore, assuming a proper first entry, the subsequent entries along the line are the result of Mr. Pommier acting as a fire marshall, or in his official capacity as an employee of the State, investigating suspicious circumstances and concerns, thereby makin him an agent of the State and triggering the warrant requirements. If any of those entries is as an agent or employee of a governmental entity, the information gained therein and therefrom, including the warrant based upon information provided, is improper and the

fruit of that unlawful search. See State v. Johnson, 716 P 2d 1288 (Idaho 1986), and Wong Sun v. United States, 83 S. Ct. 407 (1963).

The second basis for exclusion is that under the circumstances of this case, Mr. Pommier was acting as an agent. Even though not an actual employee, a private person can be an agent for purposes of the Fourth Amendment of the United States Constitution or Article I, Section 14 of the Utah Constitution under certain circumstances. As set forth and discussed in Watts, supra, there are two critical areas of inquiry, either one of which can turn an otherwise private citizen into an agent for purposes of the exclusionary rule. Those are: 1) the government's knowledge and acquiescence in intrusive conduct, and 2) the intent and purpose of the person conducting the search.

With regard to the knowledge of and acquiescence in test, the argument set forth above as to the actuality of his agency as a fire marshall and members of the fire department applies here. His knowledge, actions, and activity go to the "government's" knowledge of an acquiescence in the intrusive conduct. Mr. Pommier spent considerable time and effort to gather information, committing at least six illegal acts in connection with the breaking into the garage. Further, these occurred over a lengthy period, and when a dispute arose, he finally called in assistance in connection with his fellow fireman, Deputy Yeates. Thus, there was sufficient government knowledge and acquiescence in the intrusive conduct to warrant application of the exclusionary rule.

It is noteworthy that Mr. Pommier, while working at Defendant's home, always wore a beeper for his fire work, and for a lengthy period, normally had his dispatch radio with him, tuned-in and on. As such, he was always working in a dual function. His invasion of Defendant's privacy was precisely the type one would expect from a Fire Marshall--an inspection.

The second prong of the test under Watts is the "intent and purpose of the person conducting the search." The Utah court discussed, with approval, United States v. Walther, 652 F2d 782 (9th Cir. 1981). That involved a situation where an airline employee searched what he deemed a suspicious "Speed Pak" and turned the information over to the DEA. Although it is true that the employee had been previously rewarded for such information by the DEA, he testified he had no reason to expect to be paid in the instant case, nor had he reason not to expect payment. The court found this otherwise private airline employee to be an agent of the government for purposes of consitutional protections. The court stressed three reasons set forth for the justification of that conclusion: That the employee opened the case because of a suspicion of illegal drugs, there were no legitimate business considerations for the actions of the employee, and the expectation of potential reward. The court therefore concluded, with apparent approval of the Utah court, "We are thus satisfied that Rivard (the employee) opened the package with the requisite mental state of "an instrument or agent.'" (At 792.) Thus, the state of mind and reason for the action of the private individual, when there is any government involvement, is of crucial concern. Further, the court indicates

that "we also look at the informant's purpose in making the search."

Clearly here, in the absence of an intent to steal, the intent was to view the premises, discover contraband, and to gather evidence, since the only conclusion possible is that Mr. Pommier went back so many times (more than necessary to satisfy "curiosity") to investigate what was going on, to discover what was in there, going so far as to note or commit to memory the names written on various packages that he saw. His state of mind was to gather information and evidence, to turn over to the appropriate authorities in the Government. Therefore, his actions were unreasonable, required a warrant, and therefore any evidence found thereby should be suppressed.

Finally, there is a concern as to the State being allowed to use the illegal actions of Mr. Pommier to prosecute an individual. We have a situation where the police officers have obtained evidnce by illegal means, although such might not have been done by them personally. As such, the sense of justice and the constitutional rights of due process of law are involved, see State v. Louden, 387 P. 2d 240 (Utah 1963), and this court, as a court of law, justice, and equity, applying the law as it exists and exercising supervisory authority over the officers and parties before it, should disallow this evidence.

The trial court denied Defendants motion to suppress on this ground, in its Memorandum Decision (Appendix 36, 37).

POINT III:

THE DESTRUCTION OF EVIDENCE BY THE STATE DEPRIVED DEFENDANT OF DUE PROCESS, A FAIR TRIAL, AND OPPORTUNITY TO PROVE HIS DEFENSES

The destruction by the State of all of the chemicals, and only taking a non-random sampling of twelve or thirteen of the chemicals, when the State is going to attempt to use the particular twelve chemicals as sampled as proof that they could only have been used for the purposes of producing a controlled substance constitute a denial of the defendant's rights to the due process of law, and that the evidence of the particular chemicals should be suppressed. Finally, the Court at a minimum should have disallowed any mention of all of the other chemical substances seized and destroyed by the plaintiff without testing and analysis as to what those substances were.

In State v. Lovato, 702 P. 2d 101 (Utah 1985), the defendant was convicted of aggravated sexual assault alleged to have been aided by the use of a knife. The knife was lost or thrown away by the State and among other grounds, the defendant claimed that that denied him his rights. The Court upheld again the doctrine that the State's destruction of evidence, under certain circumstances, consitutes denial of due process, but held that in that case the knife was not sufficiently material, in the consitutional sense, to warrant it. The Court in arriving at its decision, stated, at page 106:

> "In State v. Stewart, Utah 544 P. 2d 477 (1975), we said, '[A] deliberate suppression or destruction of evidence by those charged with the prosecution, including police officers, constitutes a denial of due process if the evidence is material to guilt or innocence of the defendant in a criminal case..." Id. at 479 (Emphasis added.) We clarified this proposition in State v. Nebeker, Utah, 657 P.2d 1359 (1983), where we said, "The materiality required to reverse a criminal conviction for suppression or destruction of evidence as a denial of due process is more than evidentiary materiality.' Id. at 1363. Rather, it must be "material in the constitutional sense." Id. (emphasis added). Constitutional materiality requires that

> there be a showing that the suppressed or destroyed evidence is vital to the issues of whether the defendant is quilty of the charge and whether there is a fundamental unfairness that requires the Court to set aside the defendant's conviction. Id. A corollary of this proposition is, 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' United States v. Agurs, 427 U.S. 97, 109-10, 96 S.Ct. 2392, 2400-2401, 49 L.Ed.2d 342 (1976) (emphasis added); accord Nebeker, 657 P. 2d at 1363."

In State v. Shaffer, 725 P.2d 1301 (Utah 1986), the Utah Supreme Court dealt with another claim of destruction of evidence by the State. In that case, the State cremated the victim's remains prior to the arrest of the defendant for the death. The defendant claimed that that denied him the right to perform tests (to see if gunpowedr residue was on the hands of the victim) of a possible exculpatory nature. There again, the Supreme Court held that the materiality of the evidence was not sufficient in the constitutional sense, quoting with approval from State v. Lovato, supra.

The court set forth the standard at page 1306 as follows:

> "We agree with the State of Washington that the appropriate standard requires the prosecution 'to preserve that [evidence] which comes into [the prosecutor's] possession either as a tangible object or sense impression, if it is reasonably apparent the object or sense impression potentially constitute [sic] material evidence.' State v. Hall, 22 Wash.App. at 867, 593 P.2d at 558."

In the case at bar, the State's whole theory of their case is a function of what chemicals are together, in what proportion, and excluding innocent uses for those chemicals. As such, the existence, analysis, and presence of those chemicals is of critical and vital importance to the guilt or innocence of the defendant. It was clearly understood by the chemists that some

samples and amounts had to be preserved in order to prove the State's case. By the destruction of all other chemicals, it denied the defendant the possibility of exculpatory evidence as to other chemicals, uses, and combinations of chemicals. This was no "mere possibility". Defendant testified at trial concerning the specific uses he put the chemicals to, but it was of little value, given the enormous prejudicial effect of the government's expressed judgment of having destroyed the chemicals as "hazardous", even those in their packing containers, and the implication that bore on what the government really believed the chemicals consisted of. The jury was thereby allowed to speculate all the chemicals were intended for contraband and were culpable. It is thus material in the constitutional sense. Samples should have been taken of all of the chemicals or all of the chemicals maintained. Further, the State cannot demonstrate any sufficient need for the destruction of all of the chemicals without at least taking a sample of them. As testified to by Mr. Hall, many household chemicals are far more dangerous and hazardous than those that were destroyed (S 31).

Further, there is no presentation of any systematic, logical, or inherently reasonable methodology of the choice of the sampling and the choice of the structuring, In the absence of, the Court cannot conclude that the officers acted in good faith for valid reasons in their nonrandom sampling and their intentional destruction of the proposed evidence which they used against the defendant, all to the denial of due process rights to preservation of evidence.

In Arizona v. Youngblood, 109 S.Ct. 333 (1988), the police had taken swabs and stains with a sexual assault kit from a ten year old boy who had been sodomized. Defendant's claim was that the State failed to preserve items which could possibly be useful as a defense, and failed to do certain investigatory tests which might have revealed further information. The State in Youngblood kept the evidence, but it was not testable in its final conditions. The nature of the destruction and the type of evidence involved in this case is different that that of Youngblood. It is the State's theory in this case that a certain group and combination of chemicals sole function and use would be illegal. To prove that, they took samples of twelve out of over a hundred chemicals, and claimed that all of the chemicals could only have an illegal use as shown by the twelve that they sampled. The defendant was denied the opportunity to prove what the other chemicals were, and that there were other combinations and other lawful uses for said chemicals. The State's case was one based on circumstantial evidence and the State intentionally limited what evidence was available to prove the circumstances to what they wanted to be believed. There is a difference between the State doing nothing and allowing a medical swab (as in Youngblood) to become untestable by the action of nature, and affirmative ordering the destruction of evidence, as was done in the case at bar.

Finally, the Supreme Court of Utah has spoken on the issue, in connection with the type of evidence herein, and has it's own standard and test. Further, these cases note the difference when the evidence is of a "material nature in the constitutional

sense," as opposed to merely "possibly revelant." See State vs. Lavato, , 702 P.2nd 101 (Utah 1985). Thus, Utah recognizes the different types of evidence as were involved here, and has a different test for those, as well as for the State of Utah, than is set forth in Arizona vs. Youngblood, supra.

The trial court denied Defendants motion to suppress on this ground, in its Memorandum Decision (Appendix 36, 37).

POINT IV:

THE AUTHORITY GIVEN THE U.S. CONGRESS OR U.S. ATTORNEY GENERAL UNDER THE UTAH CONTROLLED SUBSTANCES ACT TO DESIGNATE, RESCHEDULE, OR REVISE BY ADDING, DELETING, OR TRANSFERING SUBSTANCES ON THE SCHEDULES IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

P-2-P is nowhere found or mentioned in the Utah Controlled Substances Act, Utah Code Annotated, 1953 as amended, Section 58-37-1 et seq. The term "controlled substance" is defined in two places, Section 58-37-3 and 58-37-2 (4) (Appendix 14-19). The only basis that the State can claim that P-2-P is a controlled substance is under the theory that it is a controlled substance under the Federal Controlled Substances Act, 21 U.S.C. Section 801 et seq. P-2-P is not specifically mentioned in the United States Code, but, pursuant to rules and regulations of the United States Attorney General, and their listing in the Code of Federal Regulations at 21 CFR Section 1308.12 (g), it may be a controlled substance under the Federal Act. It is the Defendant's position that the attempt to define the elements and punishment of a crime by reference to the United States Code, or the Code of Federal Regulations, promulgated pursuant to administrative rule making by the Unites States Attorney General, constitutes an unconstitutional delegation of legislative authority, and is

therefore not constitutionally valid and P-2-P is therefore not a controlled substance under the Utah Controlled Substances Act.

It is respectfully submitted that there is a Utah Supreme Court case directly on point, State vs. Gallion 572 P.2d 683 (Utah 1977). The case involved prosecution of the individual for making a forged prescription for a controlled substance, Demerol. At that time, Demerol was not a scheduled controlled substance under the state statute, but had been scheduled by the Utah Attorney General in acccordance with the Controlled Substance Act. The Utah Supreme Court held that that was improper, that the Attorney General could not so schedule a substance not listed in the legislative enactment, and that said action constituted an unlawful and illegal delegation of legislative authority under both the State and Federal Constitution. The Court held such on the basis of two separate but related arguments and concerns.

The first basis for the holding of the Court is expressed in the first half of the opinion in that Article V Section 1 of the Utah Constitution prohibits persons in the different branches of government from exercising authority over another branch. The Utah Attorney General is part of the executive branch and therefore a person who was specifically barred from exercising legislative authority. Thus, on that ground, as well as the second ground, the Supreme Court held it was unconstitutional for someone other than the legislature in that case to list a controlled substance.

The Supreme Court however also based its decision on the fact that the listing of a controlled substance under the Act, thereby defining an element of and the punishment for a crime,

was an inherently legislative function that could not be delegated to anyone. The separate nature of this second point was made explicit beginning at page 687 of the opinion, where the court stated:

> "The other aspect of this case which merits response is whether the Controlled Substance Act has improperly delegated legislative power."

The court held that the definition of a crime was an inherently legislative function, which could not be delegated to anyone. The court stated, at page 690:

> "A determination of the elements of a crime and the appropriate punishment therefore are, under our Constitutional system, judgments, which must be made exclusively by the legislature."

The Court discussed the Utah Controlled Substances Act and the manner in which it worked, which has not changed substantially since that time (with the exception of the delegation to the Congress or United States Attorney General, as discussed below). The statute has a number of different schedules, and defines the seriousness of various offenses involving those substances based upon which schedule the controlled substance is listed. Thus, what might be a felony to deal with a controlled substance under one schedule might be a misdemeanor on another. The Court discussed other jurisdictions which had similarly held drug statutes unconstitutional and distinguished the Federal case law which reached a decision contrary to that reached by the Utah Court in Gallion. In arriving at its conclusion and decision, the Court stated at page 689-90:

> "In the Controlled Substances Act, the administrator not only determines that a substance should be controlled, he further schedules the substance, which in effect, declares the magnitude of the penalty and fixes the punishment. The administrator is exercising an essential legislative function which cannot be transferred to him..."
>
> "There are sound reasons for ruling the definition of a crime and the precise punishment therefor to be an essential legislative function, which cannot be transferred. Criminal trials would be unduly complicated, for the defendant would have the right to challenge the administrative procedure and the findings where a substance has been scheduled or rescheduled. A similar determination by the legislature could not be challenged. The administrative rulings are not statutes and are not incorporated into the code, a person who wishes to abide by the law would have to resort to the permanent register kept by the secretary of state to determine the status of a substance."

Gallion involved the Utah State Attorney General. The case at bar involves the United States Congress, and pursuant to its attempted delegation of authority, the United States Attorney General in his adminstrative processes. Therefore, there is no way to successfully distinguish the present case from Gallion, supra, and therefore the attempted inclusion of P-2-P in the Utah Act as a controlled substance is void and without effect as being an unconstitutional delegation of legislative authority.

Defendant notes that at least six states' highest appellate courts (including Utah) have found their state's enactment of the Controlled Substances Act an unconstitutional delegation of legislative power: State v. Rodriguez, 379 So.2d 1084 (La. 1980); Howell v. State, 300 So.2d 774 (Miss. 1974); State v. Krego, 433 N.E.2d 1298 (Ohio, 1981); State v. Johnson, 173 N.W.2d 894 (S.D. 1970); and In Re Powell, 602 P.2d 711 (Wash. 1979). Additionally, the Supreme Court of Appeals of West Virginia found that, pertaining to its drug statute, the adoption of future laws

(see below) of the federal government or its agencies is unconstitutional as an unlawful delegation of legislative power (State v. Grinstead, 206 S.E.2d 912 (W.Va. 1974).

In Howell, defendant was convicted of the possession of amphetamines. The Supreme Court of Mississippi held that the statute which delegated the power to the State Board of Health to reschedule drugs was an unconstitutional delegation of the legislatures power to define crimes and fix the punishment for them, as well as a violation of the State Constitution's separation of powers clause. The State Board had transferred amphetamines from a Schedule III drug to Schedule II, thus increasing the penalties.

In Krego, an identical opinion resulted from a nearly identical rescheduling of the drug phencyclidine, in Ohio.

In Powell, The Supreme Court of Washington, in reviewing a detention for possession of the drug Dalmane, found the legislative delegation to the State Board of Pharmacy unconstitutional.

Generally, a state legislature cannot constitutionally delegate its legislative powers to Congress or federal agencies. Gallion appears to place Utah clearly in the group of states prohibiting legislative delegation to Congress or federal agencies or officers for the creation of serious crimes, specifically. Although there is some conflict, it is generally held that the adoption by or under authority of a state statute of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power.

A Maine statute declaring "intoxicating", within the meaning of the act, any beverage containing a percentage of alcohol which by federal enactment or U.S. Supreme Court decision was declared to be an intoxicating beverage, was held invalid and an abdication of the legislative function, in State v. Intoxicating Liquors, 117 A 588 (Me. 1922). State v. Gauthier, 118 A 380 (Me. 1922).

Legislative power was improperly delegated by a provision of a state statute setting forth that the maximum periods of labor in certain industries should be fixed by the State Department of Labor to conform to the schedule established by federal authorities, in Holgate Bros. Co. v. Bashore, 200 A 672 (Pa. 1938).

In Darweger v. Staats, 196 NE 61 (N.Y. 1935), a state statute required that agreements, codes, licenses, and rules adopted by the Federal Government in pursuance of the National Industrial Recovery Act were required to be filed, and, once a Code of Fair Competition, as approved by the President of the United States, had been filed, the standard of fair competition in certain trades and industries would be determined by such codes, rules, agreements, and regulations. The court held the statute an unconstitutional delegation of legislative authority.

A state statute imposing an income tax equal to one-third of the U.S. income tax for which the taxpayer was liable under the act of Congress and I.R.S. regulations was held to adopt only the act and regulations as they existed at the time of enactment of the statute, and not to include future amendments or regulations,

and was hence not to be an invalid delegation of legislative authority, in Santee Mills v. Query, 115 S.E. 202 (S.C. 1922).

In Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958), a statute was passed establishing the standard time in Kentucky to be that established by Act of Congress, or order of the Interstate Commerce Commission. The court held it to be an unconstitutional abdication insofar as it "adopts time standards to be fixed in the future." (At 536, emphasis in original.)

A graduate of a foreign medical school applied for licensing to practice medicine in Washington. The previous statute allowed licensing if the applicant graduated from a school maintaining a standard equivalent to those prescribed by the American Medical Association. The statute under review required the school to be on a list prepared by certain learned medical societies. At the time of enactment, the list did not yet exist, but was first produced three years after enactment of the statute. This was held to be an unconstitutional delegation of legislative power, in view of the future actions required at the time of enactment, voided the statute. State v. Urquhart, 310 P.2d 261 (Wash. 1957).

The Supreme Court of Minnesota, in Wallace v. Commissioner of Taxation, 184 N.W.2d 588 (Minn. 1971), held that the enactment of a statute to the effect that the term "gross income" for state income tax returns means adjusted gross income as computed for federal income tax purposes did not and could not cause a subsequently enacted federal statutory amendment, requiring a 30-day waiting period before sick pay could be deducted from gross

income, to have force and effect on state law, since it was an unconstitutional delegation of legislative power.

In Seale v. McKennon, 336 P.2d 340 (Ore. 1959), a statute requiring the Oregon State Department of Agriculture to adopt the minimum regulations and laws of Unites States Department of Agriculture, inter alia, was interpreted so as to avoid unconstitutionality in legislative delegation. Future modifications of the federal laws and regulations were deemed not to be included in the statute's direction.

Thus, it is seen that it has been widely held that a legislature cannot delegate to Congress or a federal agency power to create laws in the future.

Specifically, in the area of delegating future powers to schedule and designate controlled substances, cases consistent with the Utah position expressed in Gallion are found in State v. Johnson, 173 N.W.2d 894 (S.D. 1970) and in State v. Rodriguez, 379 So.2d 1084 (La. 1980), in which cases the state statutes specifically included provisions for automatic inclusion of any federally scheduled drug, and on that basis, the drug statute was found an unconstitutional delegation. In Johnson, the statute prohibited sale of any drug which contained any quantity of substance designated by regulations promulated under the Federal Food, Drug, and Cosmetic Act. Defendant was charged with selling LSD, which was not specified on the statute, other than by reference to the federal act. The court held, at 895:

> "'Statutes adopting laws or regulations of other states, the federal government, or any of its agencies, effective at the time of adoption are valid, but attempted adoption of future laws, rules or regulations of other states, or of the federal government, or of its commission

and agencies generally have been held unconstitutional as an unlawful delegation of legislative power.'" (Citations omitted.)

"The statute does not adopt the regulations of the federal government or one of its agencies at a given time, but attempts to adopt any and all regulations and changes therein promulgated under the federal act in futuro ad infinitum. This the legislature could not constitutionally do..."

In Rodriguez, supra, the defendant was charged with possession of Talwin. The State Secretary of Department of Health and Human Resources, pursuant to statute, added it to the list of controlled substances days after the Drug Enforcement Agency of the Department of Justice classified Talwin as a controlled substance. The court held, at 1087:

"This prohibition against delegating the power to create crimes applies not only to a delegation to a state agency, such as the Deprtment of Health and Human Resources, but to any other agency or body, such as the Drug Enforcement Administration. The Louisiana legislature is not authorized to delegate its legislative power to a federal agency, nor to Congress."

Also, Grinstead, supra, involved a conviction for possession, delivery and sale of the drug LSD. Until 1968, the West Virginia legislature had not explicitly outlawed LSD, but in 1968, Congress amended the Food, Drug and Cosmetic Act to include LSD. West Virginia's statute defined a "dangerous drug" as one described under the Federal Food, Drug and Cosmetic Act. Thereafter, the State Board of Pharmacy, with reference to the federal act, declared LSD a dangerous drug. Subsequent to this, Grinstead was indicted. The court held:

"The Legislature cannot delegate its authority to enact criminal laws to an agency which is a unit of the exectutive branch of State government, nor can it, under the guise of a colorable delegation, permit the Board of Pharmacy to adopt

a federal law which has not been given prior approval by the Legislature."

The primary objection the Grinstead court had to the delegation was that it was a delegation to the federal government in futuro.

The Utah Controlled Substances Act went into effect on January 1, 1972. Laws 1971, Ch. 145. On March 6, 1979, the legislature passed an amendment to the Act, which went into effect on May 8, 1979. Laws 1979, Ch. 12. The 1979 amendment added the new Subsection (5) to Utah Code Annotated, 1953 as amended, 58-37-2, providing:

> "The words "controlled substance" mean a drug, substance or immediate precursor included in I, II, III, IV or V or section 58-37-4. "Controlled substance" shall also include a drug, substance, or immediate precursor included in schedules I, II, III, IV or V of the Federal Contolled Substances Act (Title II, P.L. 91-513), as such schedules may be revised to add, delete or transfer substances from one schedule to another, wherther by Congressional enactment or by administrative rule of the United States Attorney Genral adopeted pursuant to Section 201 of that act. The words do not include distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32, tobacco or food."

Similar delegatory language also appears in the 1971 enactment, at 18(d) and 23. That language has survived nearly unchanged in our present 58-37-2(8)(d) and (16).

Subsections (2) and (3) of Utah Code Annotated, 1953 as amended, 58-37-3, were also added, in 1979:

> "(2) All controlled substances listed in the Federal Controlled Substances Act (Title II, P.L. 91-513), as it is amended from time to time, are hereby controlled."

> "(3) Whenever any substance is designated, rescheduled or deleted as a controlled substance in schedules I, II, III, IV or V of the Federal Controlled Substances Act (Title II, P.L. 91-513), as such schedules may be revised by Congressional enactment or by administrative rule of the United States Attorney General adopted pursuant to section

201 of that act, that subsequent designation, rescheduling or deletion shall govern."

These subsections survive basically unchanged in our present law.

P-2-P is not listed in the Utah Controlled Substance Act, explicitly.

The Controlled Subtance Act (21 USCA 801 et seq.) was enacted by Congress on October 27, 1970. Section 811 (Appendix 20-4) sets forth the operative language for exercise of delegations to the Attorney General. Subsection (a) and (b) provide a means by which the U.S. Attorney General may add, transfer between schedules, or remove a drug from schedules. First, he must request a scientific and medical evaluation, and the Secretary's recommendations, from the Secretary of Health, Education and Welfare (now Health and Human Services). Then he must make findings, and follow the federal rulemaking procedure.

However, 21 USCA 811(e) provides the U.S. Attorney General may, with regard to "immediate precursors", dispense with the scientific and medical evaluations, the Secretary's recommendations, findings, and the rulemaking procedures altogether. Since the requirement of findings is dispensed with, the protective factors and guidelines of 21 USCA 811(c) are also discarded.

On December 7, 1979, nine months after the Utah Legislature amended Utah Code, Sec. 58-37-2, and 58-37-3, seven months after they went into effect, and almost eight years after the initial Utah enactment of 58-37-2 (which contained--in Subsection 23--references to the U.S. Attorney General making findings and designations as to precursors), the U.S. Attorney General

designated P-2-P as a "precursor", and amended Title 21, Section 1308.12, to add a new subsection "f", which caused P-2-P, also known as phenylacetone, to be included in Schedule II of the Federal Act. The effective date of the criminal prohibition was even later, February 11, 1980. Federal Register, volume 44, No. 240, page 71824. (Appendix, 25-27) On May 1, 1986, the Attorney General amended by mere renumbering the section 21 CFR 1308.12(f) to (g). (Appendix, 28, 29. Appendix 30 shows 21 CFR 1308.12 as of the 4-1-79 revision, that is, without the subsection (f)--P-2-P addition. Appendix 31 and 32 show 21 CFR 1308.12 with the addition of (f)--and P-2-P, which is the revision as of 4-1-80.)

Unquestionably, the Utah Legislature purportedly delegated the power to the U.S. Attorney General in May 1979 (or earlier) of making future additions to the controlled substance schedules, and P-2-P was added by the Attorney General subsequent to the delegation by the Utah Legislature, on December 7, 1979, effective February 11, 1980. As such, it was a purported delegation in futuro ad infinitum, and unconstitutional.

Defendant raised these issues pre-trial (R1 30-45) and at the end of the State's evidence, when Defendant moved for a directed verdict (R2 425), but they were denied (R1 45, R2 432-3).

POINT V:

THE AUTHORITY GIVEN THE U.S. CONGRESS OR U.S. ATTORNEY GENERAL UNDER THE UTAH CONTROLLED SUBSTANCES ACT TO DESIGNATE, RESCHEDULE, OR REVISE BY ADDING, DELETING, OR TRANSFERING SUBSTANCES ON THE SCHEDULES IS A DEPRIVATION OF DEFENDANT'S DUE PROCESS RIGHTS TO REASONABLE NOTICE OF PROSCRIBED CONDUCT

The Utah Supreme Court, in Gallion, observed, at 690:

> "The adminsitrative rulings are not statutes and are not incorporated into the code, a person who wishes to abide by the law would have to resort to the permanent register kept by the secretary of state to determine the status of a substance."

Since the delegation is to the U.S. Attorney General, the burden to a person of average intelligence is complicated, by requiring that person to follow the very complicated workings of the Federal Register and the Code of Federal Regulations, in addition to the Utah statute. A person is not given fair notice that his contemplated conduct is prohibited by statute. Defendant, in being charged with and convicted of violation of a statute so convoluted in its means of providing notice to the world, is deprived of due process. A crime so difficult to learn of is in a serious sense confusing and vague. Looking to the Utah statute for guidance, a person would not find P-2-P, and would only find vague words such as "controlled substance". Grinstead, ibid. at 915, and 918, alludes to this problem, but is unclear as to whether it is a ratio decendis. State v. Johnson, 173 N.W.2d 894, at 895, alludes to it, in passing. In State v. Dougall, 570 P.2d 137 (Wash), at 138, the court concluded:

> "[i]t is unreasonable to expect an average person to continually research the Federal Register to adetermine what draugs are controlled substances under RCW 69.50."

His Honor, Judge Low, having heard the evidence, commented on the problem (R2 431-2):

> "I think it's a disconcerting issue. As to notice and fairness, I am aware the language in the Gallion case which raises that concern and issue. And I suppose it's most bothersome to the court, to the defendant's ability to be put on notice of changes in the federal legislation by the method prescribed in the federal legislation. And the defendant's or any defendant's ability to become aware of those kind of changes."

Gallion, at 688, cites the preference in Utah for crimes to be stated in the state statutes:

> "In State v. Johnson (44 Utah 18, 26, 137 P. 632 (1913)) this court held that under the Constitution, the courts may not denounce and punish as crimes acts and omissions not made punishable by statute, for it is a legislative power to declare acts as crimes and to prescribe proper penalties."
>
> "The consititutional standard set forth in State v. Johnson is incorporated in the Utah Criminal Code. Section 76-1-105, as enacted in 1973, amended 1974, provides:"
>
> > "Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance."

Defendant raised this issue in his motion for directed verdict (R2-426), and pre-trial (R1 30-45), but it was denied (R1 45, R2 432-3).

POINT VI:

THE COURT ERRED IN FAILING TO GIVE THE JURY INSTRUCTION THAT THE STATE HAD THE BURDEN OF PROVING THE PROPRIETY OF THE ADMINISTRATIVE PROCEDURE FOR SCHEDULING THE TO-BE-CONTROLLED SUBSTANCE

In Gallion, at 689, the Court held:

> "There are sound reasons for ruling the definition of a crime and the precise punishment therefor to be essential legislative functions, which cannot be transferred. Criminal trials would be unduly complicated, for the defendant would have the right to challenge the administrative procedure and the findings where a substance has been scheduled or rescheduled."

Defendant tendered Jury Instruction No. 1 to the court (Appendix, 33, 34), in compliance with this holding in Gallion. It simply set forth the pertinent requirements of 21 USCA 811. The court declined to give the instruction, and counsel for Defendant stated his objections to the failure (R2 518-9). Further, counsel for Defendant objected to the giving of Instruction No. 5 (Appendix, 35, R2 521), which implicitly and

erroneously assumes the premise of what the jury would have been required to find, viz. that P-2-P was a controlled substance. Nonetheless, the court gave instruction No. 5. As a result, the Defendant was denied the right to "challenge the administrative procedure and the findings" (Gallion, ibid. at 689), to his serious prejudice.

Conclusion

Therefore, on its face the affidavit in support of the warrant does not contain sufficient probable cause to believe that the defendant was actively engaged in criminal activity, based further upon the fact that certain information should be excised and certain added to the warrant, and based upon the staleness of the information in the affidavit, the evidence gathered should be suppressed.

Further, the informant in this case, was a government employee or agent, or acted with the requisite frame of mind and by the requisite means to be treated as acting as a government agent, and acted with serious culpable conduct. Therefore, his actions should fall under the governance of the Fourth Amendment, and, obviously, be suppressed.

Additionally, due to the destruction of the chemical evidence by the State, without full sampling, all chemical evidence should have been suppressed, and, at least, the State should've been barred from alluding to any other chemicals other than those few sampled. Due to the prejudice created, directed verdict should've been granted.

Since Utah has already decided that delegations of legislative power to define felony crimes pertaining to

controlled substances, and to fashion punishments therefore, is an unconstitutional delegation of legislative power, and since the addition of P-2-P was done after the enactment of the statute, the incorporation of P-2-P into the Utah statute was unconstitutional, as a delegation, and worse, as a delegation in futuro ad infinitum.

The convoluted means of incorporating future laws, as was used in the purported enactment of the P-2-P inclusion, fails to give notice to persons, sufficient to assure their due process rights, and as such is vague and confusing.

The failure of the court to give the instruction on proof of proper enactment of the P-2-P scheduling, by the Attorney General, deprived Defendant of due process.

Wherefore, Defendants asks the court to reverse the judgment and conviction, and remand for a dismissal.

RESPECTFULLY SUBMITTED this 16th day of August, 1989.

DANIEL R. KNOWLTON
Attorney for
Defendant and Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the 17th day of August, 1989, four copies of the foregoing Appellant's Brief were delivered to Office of Attorney General, 236 State Capitol Building, Salt Lake City, Utah.

DANIEL R. KNOWLTON

APPENDIX

INDEX TO APPENDIX

JON J. BUNDERSON
BOX ELDER COUNTY ATTORNEY
45 North First East
Brigham City, Utah 84302
Telephone: (801) 734-9464

IN THE FIRST CIRCUIT COURT, BRIGHAM CITY DEPARTMENT

BOX ELDER COUNTY, STATE OF UTAH

IN RE: THE INVESTIGATION OF AN ILLEGAL DRUG LABORATORY	AFFIDAVIT REQUESTING ISSUANCE OF SEARCH WARRANT Criminal No. _____

Comes now MIKE JOHNSON, being first duly sworn on his oath in this matter, and swears and deposes as follows:

1. Your affiant is a Peace Officer with fourteen (14) years of Law Enforcement experience, currently employed by the Box Elder County Sheriff's Office.

2. Your affiant has worked Drug and Controlled Substance Investigations for over five (5) years, during which years your affiant has been involved in over one hundred (100) drug investigations involving: Illegal Possession of Controlled Substances, Illegal Distribution of Controlled Substances, Cultivation of Controlled Substances, and Manufacturing of Controlled Substances.

3. Your affiant has been trained in the investigation of drug cases as follows:

Utah P.O.S.T. basic training on Drug Enforcement and Identification.

1-day school on Clandestine Lab Cases, Instruction by Utah P.O.S.T.

3-day school on Clandestine Labs presented by D.E.A.

1-day school on Clandestine Drug Manufacturing.

1-week seminar on Drug and Lab Investigations presented by the Institute for Law and Justice, Inc.

2-week national D.E.A. seminar covering most areas of Drug Investigations.

4. On June 29th, 1988, a confidential informant (hereinafter referred to as CI) met with your affiant. The CI told your affiant of what he believed to be a Clandestine-type Lab producing an illegal substance located at a residence in Perry, Utah, which does not have a street address to the knowledge of your affiant. The residence is described and known to your affiant as the Bob Wendel Home, located across the highway from the Walker Cinema, east of said highway approximately one-fourth (¼) to one-half (½) mile.

5. The CI described the area within the residence where the lab is located as being in the front garage, with various chemicals stored in other parts of the residence. The CI further described tubes running to the outside of the residence from the front garage area, and the CI described various equipment and glassware upon the premises as follows:

a. Heating mantles.

b. Vessels.

c. Flasks.

d. Vacuum Pumps.

e. Electric Stirrers.

f. Filtering Funnels.

g. Vacuum Distillation Apparatus.

h. Reaction Apparatus.

i. Reflex Condensors.

j. Thermometers.

6. The CI told your affiant that he had personally seen the following chemicals in the residence.

a. Nitric Acid.

b. Sulphuric Acid.

c. Sodium Acetate.

d. Ether.

e. Other unnamed chemicals in their containers. The CI told your affiant that he read the labels on those chemicals which he could name.

7. The CI told your affiant that he has personally been in the residence on numerous occasions, between the dates of January, 1986 and April 22, 1988, and his descriptions given to the affiant are based upon his personal observations while upon the residence premises or within the residence.

8. The CI told your affiant that the occupant of the residence, James Alvin Douglas, drives an International make vehicle, which the CI saw was registered to Douglas' girlfriend, who lives in Park City, Utah.

9. The CI told your affiant that the residence is occupied by a man known to the CI as James Alvin Douglas. The CI described the residence location as noted above, and further described the premises as consisting of a white brick house located in the midst of an orchard in Perry, Utah, with outbuildings and with three (3) German Shepherd dogs living upon the premises.

10. The CI further told your affiant that Douglas

told him that the International vehicle used by him (Douglas) is specially equipped with a turbocharger and with extra gas tanks so that the same can travel approximately twelve hundred (1200) miles non-stop.

11. The CI told your affiant that the phone number on the telephone of the residence was 734-2747.

12. The CI provided your affiant with a physical description of the target, James Alvin Douglas, and described his as follows: 5'11", medium to heavy build, balding, black hair, black mustache, often wears a western hat.

13. The CI told your affiant that he smelled a strong, chemical smell on August 8th, 1988, while near the residence (but not on the premises), and that on an earlier date he had smelled the same odor while on the road near the premises.

14. The above information was provided directly to the affiant by the CI, or was provided by the CI to Detective Lynn Yeates of the Box Elder County Sheriff's Office. Detective Yeates has, in turn, provided the information he has received to your affiant in the context of the joint employment of your affiant and Lynn Yeates with the Box Elder County Sheriff's Office.

15. Your affiant considers the information received from the CI to be reliable because the CI is a member of the local community in good standing, is known to your affiant to be a reliable person, and is believed to be assisting law enforcement as a good member of the community with no claim for reward or legal favor nor any promise

of the same.

16. Your affiant has verified the above information provided by the CI to be correct and accurate through the following independent investigation:

a. Detective Lynn Yeates spoke with Art Terkelson, who is a qualified Criminalist at the Weber State Crime Laboratory in Ogden, Utah. Yeates described the equipment, glassware, and chemicals to Terkelson, and Terkelson stated that the type of equipment and glassware present (as described herein above) and the named chemicals (described herein above) were all consistent with the type of equipment and chemicals used to produce Methamphetamine or a substance known as Phenyl-2-Propanone.

b. Methamphetamine and Phenyl-2-Propanone are controlled substances under the Utah Controlled Substances Act, and your affiant is informed and believes that it is illegal to produce or possess the same without the proper licenses.

c. Your affiant has spoken with Kim Hall of the Utah Narcotics and Liquor Law Enforcement Division and is informed that upon investigation, James Alvin Douglas does not possess a license from the State of Utah which would allow him to either possess or produce Methamphetamine or Phenyl-2-Propanone.

d. Your affiant has personally travelled to the residence, without entering the private property, and examining merely what is available to see from the public roadway, has discovered the home to be a white brick house, surrounded by an orchard, located at the

approximate location described by the CI. Your affiant observed three (3) German Shepherd dogs upon the premises.

e. Your affiant has conducted surveillance of the premises, without entering the premises, and has seen a male individual leave and/or return to the premises. This male individual fits the description given by the CI of the person known as James Alvin Douglas, to wit, the individual is approximately 5 feet 11 inches, has a medium to heavy build, is balding, has black hair, and a black mustache.

f. Lynn Yeates has told your affiant that he has seen the said male individual and has noted that he was wearing a western hat during his surveillance of the premises.

g. Your affiant has personally observed, through surveillance, an International make vehicle driven by the male occupant of the premises, bearing License Plate Number Utah, 309 BHJ. Upon checking this License Number with the Utah Motor Vehicle Division, your affiant discovered that the same is registered to one Sharon L. Carbine, Box 1864, Park City, Utah.

h. Your affiant has observed a female driving another vehicle, License Plate Number 807 CBE, said vehicle also registered to the same Sharon L. Carbine at P.O. Box 1864, Park City, Utah. This female has been observed, through surveillance, leaving and/or travelling to the above described premises, and has been observed to stay there overnight on at least one occasion.

i. Through surveillance, your affiant and Detective Sergeant Ken Adams followed Douglas and the female described above, who is believed to be Sharon L. Carbine, and in a public parking lot your affiant and Sgt. Adams walked by the International vehicle driven by the target. Your affiant observed, without the aid of artificial illumination or other artificial means, that the said International vehicle is equipped with what appears to be auxiliary gas tanks. This occurred on July 28th, 1988.

k. Your affiant is aware from his training, and is also informed by Art Terkelson, that the manufacture of Phenyl-2-Propanone and Methamphetamine creates a strong odor, and that Phenyl-2-Propanone is a precursor of Methamphetamine in the said manufacturing process.

17. All observations resulting from surveillance noted herein occurred between the dates of June 29th, 1988 and September 1st, 1988.

DATED this ____ day of September, 1988.

MIKE JOHNSON, AFFIANT

NOTARY SEAL:

SUBSCRIBED AND SWORN to before me this ____ day of September, 1988.

ROBERT W. DAINES, CIRCUIT JUDGE

IN THE FIRST CIRCUIT COURT, BRIGHAM CITY DEPARTMENT

BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH	)	DEPOSITION AND AFFIDAVIT
	) ss	OF MIKE JOHNSON IN SUPPORT
COUNTY OF BOX ELDER	)	OF AND PETITION FOR SEARCH WARRANT

Personally appeared before me this _____ day of September, 1988, the deponent and affiant herein, MIKE JOHNSON, a peace officer, who, on oath, deposes and says that he has and there is probable and reasonable cause to believe, and that he does believe, that there is now (on the premises) (in the vehicle) (on the person of) located at and also described as:

The premises known as the Bob Wendel Home, located in Perry, Utah, across the highway from the Walker Cinema, east of said highway approximately one-fourth (¼) to one-half (½) of a mile, consisting of a white brick house located in the midst of an orchard, with various out-buildings and three (3) German Shepherd dogs living upon the premises; a vehicle described as an International, bearing License Plate Number 309 BHJ, Utah; the person of an individual known as JAMES ALVIN DOUGLAS;

the following personal property or evidence, to wit:

Illegal drugs, including particularly Phenyl-2-Propanone or Methamphetamine, chemicals and equipment used to manufacture Phenyl-2-Propanone and/or Methamphetamine, including but not limited to tubes, equipment, glassware, heating mantels, vessels, flasks, vacuum pumps, electric stirrers, filtering funnels, vacuum distilation apparatus, reaction apparatus, reflex condensors thermometers, and various chemicals, including but not limited to Nitric Acid, Sulphuric Acid, Sodium Acetate, Ether, and other unnamed chemicals in their containers.

Your deponent and affiant says that there is probable and reasonable cause to believe that the said property or evidence:

(X) is unlawfully acquired or unlawfully possessed.
(X) has been used as a means of committing a public offense.
(X) is being possessed with the purpose to use it as a means of committing or concealing a public offense.
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.
( ) consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity <u>not</u> a party to the illegal conduct.

Your affiant says that the facts in support of the issuance of the search warrant are as follows: AS SPECIFIED IN THE AFFIDAVIT REQUESTING ISSUANCE OF SEARCH WARRANT ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREO

Your affiant has reasonable cause to believe that grounds for the issuance of a search warrant exist, based upon the aforementioned information, facts and circumstances.

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items in the daytime and that the same be brought before this magistrate.

[illegible] may be issued for the search of the above described premises at any time of day or night and that the same be executed at any time of the day or night as there is reasonable cause to believe that a search may be necessary in the night time for the purpose of seizing the property described herein because:

It is further requested that, if appropriate, the officer executing the requested warrant not be required to give notice of his authority or purpose because:

( ) This paragraph is not appropriate to this case and such authority is not requested.

(X) The property sought is a narcotic, illegal drug, or other similar substance which may be easily and quickly destroyed or disposed of.

( ) Physical harm may result to a person if such notice is given because:

MIKE JOHNSON
Affiant

Subscribed and sworn to before me this _____ day of September, 19 88.

Judge, ROBERT W. DAINES

In the FIRST CIRCUIT Court of Box Elder County, State of Utah.

IN THE FIRST CIRCUIT COURT OF BRIGHAM CITY

BOX ELDER COUNTY, STATE OF UTAH

SEARCH WARRANT

COUNTY OF BOX ELDER

THE PEOPLE OF THE STATE OF UTAH TO: any sheriff, constable, marshal, policeman, or any other peace officer in the County of Box Elder:

Proof, by affidavit, having been this day made before me by MIKE JOHNSON that there is probable and reasonable cause for the issuance of the search warrant as set forth in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are, therefore, commanded to made immediate search (in the daytime) ~~XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~) (of the premises) (in a vehicle) (on the person of) located at and also described as: The premises known as the Bob Wendel Home, located in Perry, Utah, across the highway from the Walker Cinema, east of said highway approximately one-fourth to one-half (½) mile, consisting of a white brick house located in the midst of an orchard, with various out-buildings and three (3) German Shepherd dogs living upon the premises; a vehicle described as an International, bearing License Plate Number 309 BHJ, Utah; the person of an individual known as JAMES ALVIN DOUGLAS;

the following personal property or evidence, to-wit: Illegal drugs, including particularly Phenyl-2-Propanone or Methamphetamine, chemicals and equipment used to manufacture Phenyl-2-Propanone and/or Methamphetamine including but not limited to tubes, equipment, glassware, heating mante vessels, flasks, vacuum pumps, electric stirrers, filtering funnels, vacuum distilation apparatus, reaction apparatus, reflex condensors, thermometers, and various chemicals, including but not limited to Nitric Acid, Sulphuric Acid, Sodium Acetate, Ether, and other unnamed chemicals in their containers,
and if you find the same or any part thereof, ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXX~~ (to retain and keep it safely until further order of the court).

Given under my hand and dated this ____________ day of September, 1988.

____

JUDGE , ROBERT W. DAINES

Proof under oath having been presented to the satisfaction of the magistrate that the foregoing search warrant which has been issued, is for a narcotic or illegal drug or other similar substance which may be easily and quickly destroyed or disposed of, or that physical harm may result to any person if notice is given, you are hereby authorized to execute this search warrant without first knocking or in any way disclosing yourself, your authority, or your purpose.

_____

JUDGE, ROBERT W. DAINES

77-1a-4. Special function officer.

(1) "Special function officers" means persons performing specialized investigations, service of legal process, or security functions. These officers include state military police, constables, port of entry officers, school district security officers, fire arson investigators for any political subdivision of the state, airport security officers of any airport owned or operated by the state or any of its political subdivisions, railroad special agents deputized by a county sheriff under Section 17-30-2, and all other persons designated by statute as having peace officer authority.

(2) (a) Special function officers have peace officer authority only while engaged in the duties of their respective employment, and not for the purpose of general law enforcement. Where the officer is charged with security functions respecting facilities or property, the powers may be exercised only in connection with acts occurring on the property where the officer is employed or when required for the protection of the employer's interest, property, or employees.

(b) Airport security officers have total peace officer authority when on duty and when acting in relation to the responsibilities of the airport at which they are employed, providing that the powers may be exercised only in connection with acts occurring on the property of the airport.

(c) Special function officers may carry firearms only if authorized and under conditions as specified by the officer's employer or chief administrator. The carrying of firearms by constables is authorized only while they are engaged in the duties of their employment.

(3) (a) A special function officer may not exercise the authority of a peace officer until the officer has satisfactorily completed an approved basic training program for special function officers as provided under Subsection (3)(b) and the chief law enforcement officer or administrator has certified this fact to the director of the Division of Peace Officer Standards and Training. City and county constables and their deputies shall certify their completion of training to the county commissioner of the county they serve.

(b) The agency [that] the special function officer serves shall establish and maintain a basic special function course and in-service training programs as approved by the director of the Division of Peace Officer Standards and Training with the advice and consent of the Council on Peace Officer Standards and Training. The training shall consist of no fewer than 40 hours per year, to be conducted by the agency's own staff or other agencies.

History: C. 1953, 77-1a-4, enacted by L. 1985, ch. 174, § 3; 1987, ch. 203, § 2.

Compiler's Notes. — The 1987 amendment inserted "port of entry officers" and substituted "Section 17-30-2" for "Section 17-22-2" in the second sentence in Subsection (1); designated the formerly undesignated paragraph in Subsection (2) as Subsection (2)(b), redesignating former Subsection (2)(b) as present Subsection (2)(c); inserted "the Division of" preceding "Peace Officer Standards and Training" in Subsections (3)(a) and (3)(b); and made minor stylistic changes throughout the section.

Laws 1987, ch. 203, § 3 provides: "It is understood that a normal transition period shall be allowed to effect the transfers [of the operation of ports of entry to the highway patrol]."

(7) unethical conduct as defined in the code of ethics adopted and published by the National Association of Social Workers.

History: L. 1971, ch. 138, § 11; 1977, ch. 32, § 6; 1985, ch. 187, § 78; 1987, ch. 27, § 9.

Amendment Notes. — The 1987 amendment substituted "licensee" for "person" in the first sentence in the introductory paragraph, inserted "clinical social worker" and "or as a member of any other health care profession" in Subsection (3), inserted "falsely" in Subsection (4), and made other minor changes.

CHAPTER 37
CONTROLLED SUBSTANCES

Sunset Act. — Section 63-55-7 provides that Chapter 37, Title 58 is terminated on July 1, 1997.

58-37-1. Short title — "Utah Controlled Substances Act."

COLLATERAL REFERENCES

A.L.R. — When may offender found guilty of multiple crimes under Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS §§ 841-851) be punished for only one offense, 80 A.L.R. Fed. 794.

58-37-2. Definitions.

As used in this chapter:

(1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(a) a practitioner or, in his presence, by his authorized agent; or

(b) the patient or research subject at the direction and in the presence of the practitioner.

(2) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a common or contract carrier, public warehouseman, or employee of any of them.

(3) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(4) "Controlled substance" means a drug, substance, or immediate precursor included in schedules I, II, III, IV, or V of Section 58-37-4, and also includes a drug, substance, or immediate precursor included in schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513, as those schedules may be revised to add, delete, or transfer substances from one schedule to another, whether by Congressional enactment or by administrative rule of the United States Attorney General adopted under Section 201 of that act. Controlled substance does not include distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, regarding tobacco or food.

(5) "Counterfeit substance" means:

(a) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(b) any substance that is represented to be a controlled substance.

(6) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(7) "Department" means the Department of Commerce.

(8) "Depressant or stimulant substance" means:

(a) a drug which contains any quantity of:

(i) barbituric acid or any of the salts of barbituric acid; or

(ii) any derivative of barbituric acid which has been designated by the secretary as habit-forming under Section 502(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 352(d));

(b) a drug which contains any quantity of:

(i) amphetamine or any of its optical isomers;

(ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or

(iii) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system; or

(c) lysergic acid diethylamide;

(d) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(9) "Dispense" or "prescribe" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(10) "Dispenser" means a pharmacist who dispenses a controlled substance.

(11) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(12) "Distributor" means a person who distributes controlled substances.

(13) "Drug" means:

(a) articles recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them;

(b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(c) articles, other than food, intended to affect the structure or function of man or other animals; and

(d) articles intended for use as a component of any articles specified in Subsection (a), (b), or (c); but does not include devices or their components, parts, or accessories.

(14) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to his dependency.

(15) "Food" means:

(a) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(b) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(16) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(17) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(18) "Manufacturer" includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who

dispense or compound prescription orders for delivery to the ultimate consumer.

(19) "Marijuana" means all species of the genus Cannabis and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant Cannabis sativa or any other species of the genus Cannabis which are chemically indistinguishable and pharmacologically active are also included.

(20) "Money" means officially issued coin and currency of the United States or any foreign country.

(21) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(a) opium, coca leaves, and opiates;

(b) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(c) opium poppy and poppy straw; or

(d) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (a), (b), or (c), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(22) "Negotiable instrument" means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(23) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(24) "Opium poppy" means the plant of the species Papaver somniferum L., except the seeds of the plant.

(25) "Person" means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(26) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(27) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, obtaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that he jointly

participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring.

(28) "Practitioner" means a physician, dentist, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(29) "Proceeds" means whatever is received when an object is sold, exchanged, or otherwise disposed of.

(30) "Production" means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(31) "Securities" means any stocks, bonds, notes, or other evidences of debt or of property.

(32) "State" means Utah.

(33) "Ultimate user" means any person who lawfully possesses a controlled substance for his own use, for the use of a member of his household, or for administration to an animal owned by him or a member of his household.

History: L. 1971, ch. 145, § 2; 1977, ch. 29, § 3; 1979, ch. 12, § 1; 1981, ch. 75, § 1; 1982, ch. 12, § 1; 1987, ch. 190, § 1; 1989, ch. 50, § 1; 1989, ch. 186, § 1; 1989, ch. 225, § 60.

Amendment Notes. — The 1987 amendment alphabetized the definitions and renumbered the subsections accordingly; in Subsection (5), designated the existing language as Subsection (a), added Subsection (b), and, in Subsection (a), deleted "controlled" preceding the first two instances of "substance" and substituted "falsely purports to be a controlled substance" for "thereby falsely purports or is represented to be the product of, or to have been"; deleted a definition of "Distribute for value" contained in former Subsection (8); deleted "far" preceding "dependent" in Subsection (14); deleted the former undesignated paragraph at the end of this section, which read "This act does not infringe upon the rights of citizens to purchase and use herbs and food supplements of vegetable origin and does not restrict the non-allopathic practitioners, the herbalist, the massage therapists"; and made minor changes in phraseology throughout the section.

The 1989 amendment by Chapter 225, effective March 14, 1989, substituted "Department of Commerce" for "Department of Business Regulation" in Subsection (7) and "Health and Human Services" for "Health, Education and Welfare" in Subsections (8)(b)(iii) and (8)(d).

The 1989 amendment by Chapter 186, effective April 1, 1989, inserted "or a listed chemical" in Subsections (6) and (11) and corrected a typographical error in Subsection (8).

The 1989 amendment by Chapter 50, effective April 24, 1989, substituted "species of the genus Cannabis and all parts of the genus" for "parts of the plant cannabis sativa L." near the beginning of the first sentence and inserted "or any other species of the genus Cannabis" in the last sentence of Subsection (19) and made a stylistic change in Subsection (33).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Federal law. — The federal Controlled Substances Act, cited in Subsection (4), is codified as 21 U.S.C. § 801 et seq. Section 201 of the Act is 21 U.S.C. § 811.

NOTES TO DECISIONS

Distribution.

The evidence was sufficient to support a conviction for distribution of a controlled substance where the defendant, who was approached with a request to sell marijuana to a police officer, agreed, quoted the selling price, and then personally delivered the contraband and received the money at his apartment; he did not merely find, direct, and introduce the officer to another drug dealer. State v. Fixel, 744 P.2d 1366 (Utah 1987).

(27) to (30); and designated former Subsection (27) as the last paragraph.

Meaning of "this act". — See the note under the same catchline following § 58-37-1.

NOTES TO DECISIONS

ANALYSIS

Delivery.
Distribution.
Incomplete sale.
"Production."

Delivery.

The definition for delivery makes it clear that agency is not to be considered in finding criminal culpability under the Controlled Substances Act. State v. Casias, 567 P.2d 1097 (Utah 1977).

Distribution.

There was no distribution by the defendant where an undercover police agent gave marijuana to the defendant. State v. Soroushirn, 571 P.2d 1370 (Utah 1977).

Incomplete sale.

Where defendant agreed to sell cocaine to an undercover agent, and the parties then proceeded, with the cocaine, to another location in order that the agent could obtain money for the purchase, a distribution of cocaine for value did not take place, although the evidence was sufficient to support a conviction for the lesser offense of attempt to distribute a controlled substance. State v. Devlin, 699 P.2d 717 (Utah 1985).

"Production."

The cooking and adding of chemicals to the marijuana plant in an effort to produce "hash," a more potent and concentrated form of marijuana, was sufficient to indicate defendants intended to engage in the processing of a controlled substance directly or indirectly by extraction from substances of natural origin and to sustain a conviction for possession with intent to produce or manufacture a controlled substance. State v. Horsley, 596 P.2d 661 (Utah 1979).

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Drugs, Narcotics, and Poisons § 7 et seq.
C.J.S. — 72 C.J.S. Poisons § 1.

Key Numbers. — Drugs and Narcotics ⇐ 42; Poisons ⇐ 2.

58-37-3. Substances which are controlled — Revised federal schedules govern.

(1) All controlled substances listed in § 58-37-4 are hereby controlled.

(2) All controlled substances listed in the Federal Controlled Substances Act (Title II, P.L. 91-513), as it is amended from time to time, are hereby controlled.

(3) Whenever any substance is designated, rescheduled or deleted as a controlled substance in schedules I, II, III, IV or V of the Federal Controlled Substances Act (Title II, P.L. 91-513), as such schedules may be revised by Congressional enactment or by administrative rule of the United States Attorney General adopted pursuant to § 201 of that act, that subsequent designation, rescheduling or deletion shall govern.

History: L. 1971, ch. 145, § 3; 1979, ch. 12, § 2.

bis plant; consequently, in prosecution for possession of marijuana, prosecution need not prove that substance found in defendant's possession consisted of proscribed portions of Cannabis plant. United States v Span (1975, CA10 Kan) 515 F2d 579.

To extent hashish contains THC it is controlled substance under 21 USCS § 802(15). United States v Kelly (1976, CA9 Idaho) 527 F2d 961.

District Court did not err in instructing jury that 21 USCS § 802(15), which defines marijuana as plant cannabis sativa L, comprehends other forms of plant and prohibits possession of all varieties of marijuana. United States v Gagnon (1980, CA10 Okla) 635 F2d 766, cert den 451 US 1018, 69 L Ed 2d 390, 101 S Ct 3008.

21 USCS § 802(15) outlaws all species of marijuana containing tetrahydrocannabinol. United States v Lupo (CA7 Wis) 652 F2d 723, cert den 457 US 1135, 73 L Ed 2d 1353, 102 S Ct 2964).

Congress intended inclusion of indicia variety within definition of marijuana. United States v Moore (1970, ED Pa) 330 F Supp 684, affd (CA3 Pa) 446 F2d 448, cert den 406 US 909, 31 L Ed 2d 820, 92 S Ct 1617.

8. "Narcotic drug"

Definition of "narcotic drugs" as used in predecessor to this section included cocaine. Lastra Padilla v United States (1960, CA5 Fla) 278 F2d 188.

Legislative history of 21 USCS § 802(15) indicates definition of marijuana was intended to only include those parts of marijuana which contain tetrahydrocannabinol. Thomas v United States (1976, Dist Col App) 352 A2d 390.

Definition of marijuana as Cannabis sativa within meaning of 21 USCS § 802(15) includes all Cannabis, even though Cannabis sativa is only one of several species of marijuana. People v Riddle (1975) 65 Mich App 433, 237 NW2d 491.

Percodan tablets containing one per cent of "dihydrohydroxycodeinone hydrochloride" commonly called codeinone, were narcotics within meaning of predecessor to this section. Rivas v United States (1966, CA9 Cal) 368 F2d 703, cert den 386 US 945, 17 L Ed 2d 875, 87 S Ct 980 and (disagreed with United States v Himmelwright (CA5 Fla) 551 F2d 991, cert den 434 US 902, 54 L Ed 2d 189, 98 S Ct 298).

Congress has perogative to classify cocaine, which is non-narcotic central nervous system stimulent, as narcotic for penalty and regulatory purposes. United States v Stieren (1979, CA8 Iowa) 608 F2d 1135.

Combined effect of statutory definitions of "dispense" and "practitioner" is to limit meaning of "dispense" to delivery of controlled substances by physician acting in course of professional practice or research; delivery of controlled substances outside course of professional practice or research constitutes "distributing", which violates 21 USCS § 841(a)(1), even if carried on by registered physician. United States v Badia (1973, CA1 Mass) 490 F2d 296 (disagreed with United States v Genser (CA10 Colo) 710 F2d 1426).

Although statutory definition of "narcotic drug" is broader than dictionary definition, Congress need not follow latter in applying term to number of different classes of drugs for purposes of legal control; classification of cocaine within definition of "narcotic drug" under 21 USCS § 802(16) is not arbitrary and irrational. United States v Di Laura (1974, DC Mass) 394 F Supp 770.

9. "Practitioner"

"Osteopathic physicians" in Kansas were not "physicians." Burke v Kansas State Osteopathic Asso, Inc. (1940, CA10 Kan) 111 F2d 250.

Doctor who acts other than in course of professional practice is not practitioner under Controlled Substance Act and is therefore not authorized to prescribe controlled substances and is subject to criminal provisions of act. United States v Rosenberg (1975, CA9 Cal) 515 F2d 190, 33 ALR Fed 196, cert den 423 US 1031, 46 L Ed 2d 404, 96 S Ct 562 and (disagreed with United States v Genser (Ca10 Colo) 710 F2d 1426).

Osteopath was "physician." Hostetler v Woodworth (1928, DC Mich) 28 F2d 1003.

10. "Ultimate user"

Term "ultimate user" includes person who has obtained drug for his own use; it does not require that he in fact use it therefor. United States v Bartee (1973, CA10 Colo) 479 F2d 484.

11. "United States"

Suitcase containing cocaine which had been abandoned on luggage carousel at Miami Airport had been imported into "United States" within meaning of 21 USCS § 802(26). United States v Catano (1977, CA5 Fla) 553 F2d 497, 2 Fed Rules Evid Serv 73, cert den 434 US 865, 54 L Ed 2d 140, 98 S Ct 199.

§ 803. [Repealed]

HISTORY; ANCILLARY LAWS AND DIRECTIVES

This section (Act Oct. 27, 1970, P. L. 91-513, Title II, Part A, § 103, 84 Stat. 1245) was repealed by Act Oct. 18, 1977, P. L. 95-137, § 1(b), 91 Stat. 1169. This section authorized the Bureau of Narcotics and Dangerous Drugs to add 300 agents and necessary supporting personnel.

AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

§ 811. Authority and criteria for classification of substances

(a) Rules and regulations of Attorney General; hearing. The Attorney General shall apply the provisions of this title to the controlled substances listed in the schedules established by section 202 of this title [21 USCS § 812] and to any other drug or other substance added to such schedules under this title. Except as provided in subsections (d) and (e), the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 202 [21 USCS § 812(b)] for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5 of the United States Code [5 USCS §§ 551 et seq.]. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances. The Attorney General shall, before initiating proceedings under subsection (a) to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) and any scientific or medical considera-

tions involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a).

(c) Factors determinative of control or removal from schedules. In making any finding under subsection (a) of this section or under subsection (b) of section 202 [21 USCS § 812(b)], the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this title.

(d) International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances. (1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 202(b) [21 USCS § 812(b)] and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may

justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall transmit timely notice to the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention of Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this title to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 et seq.] do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], after consultation with the Attorney General, shall first determine whether existing legal controls under this title applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 et seq.], meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

(i) if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, within the period specified in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], that proceedings initiated under recommendations made under paragraph [subparagraph] (B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this title [21 USCS §§ 821 et seq.] which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this title [21 USCS §§ 821 et seq.] which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum

United States obligations under paragraph 7 of article 2 of the Convention,

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 202(b) [21 USCS § 812(b)] and without regard to the procedures prescribed by subsection (a) or (b) of this section

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978, or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information

(e) Immediate precursors. The Attorney General may, without regard to the findings required by subsection (a) of this section or section 202(b) [21 USCS § 812(b)] and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors

(f) Abuse potential. If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General

(g) Non-narcotic substances sold over the counter without a prescription; dextromethorphan. (1) The Attorney General shall by regulation exclude any nonnarcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 et seq], be lawfully sold over the counter without a prescription

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this title unless controlled after the

date of such enactment [enacted Oct 27, 1970] pursuant to the foregoing provisions of this section

(Oct 27, 1970, P L 91-513, Title II, Part B, § 201, 84 Stat 1245, Nov 10, 1978, P L 95-633, Title I, § 102(a), 92 Stat 3769)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title', referred to in this section, is Title II of Act Oct 27, 1970, P L 91 513, 84 Stat 1242, which appears generally as 21 USCS §§ 801 et seq For full classification of such Title, consult USCS Tables volumes

"The effective date of this part", referred to in this section, is Oct 27, 1970 which is the effective date of Part B of Title II of Act Oct 27, 1970, P L 91-513, as provided by § 704(b) of such Act, which appears as 21 USCS § 801 note "Schedule IV or V", referred to in this section, appears in 21 USCS § 812(c)

"The Psychotropic Substances Act of 1978" referred to in this section, is Act Nov 10, 1978, P L 95 633 92 Stat 3768 which amended this section, among other things for full classification of this Act, consult USCS Tables volumes

Explanatory notes:

The bracketed words "Secretary of Health and Human Services" are inserted on authority of Act Oct 17, 1979 P L 96-88, Title V, § 509, 93 Stat 695 which appears as 20 USCS § 3508, and which redesignated the Secretary of Health, Education, and Welfare as the Secretary of Health and Human Services and provided that any reference to the Secretary of Health, Education, and Welfare, in any law in force on the effective date of such Act Oct 17, 1979, shall be deemed to refer and apply to the Secretary of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary of Education or the Department of Education under such Act Oct 17 1979

The bracketed word "subparagraph" is inserted in subsec (d)(4)(A) of this section as the word probably intended by Congress

Effective date of section:

Act Oct 27, 1970, P L 91-513, Title II, Part G, § 704(b), 84 Stat 1284, which appears as 21 USCS § 801 note, provided that this section is effective upon enactment on Oct 27 1970

Amendments:

1978. Act Nov 10, 1978, in subsec (d), designated the existing provisions as para (1), and added paras (2)–(5)

Other provisions:

Effective date of 1978 amendment. Act Nov 10, 1978, P L 95-633, Title I, § 112, 92 Stat 3774, which appears as 21 USCS § 801a note, provided that the amendment of this section shall take effect on the date the Convention on Psychotropic Substances, signed at Vienna, Austria on February 21, 1971, enters into force in respect to the United

"Except as otherwise provided in this subtitle, this subtitle [adding 21 USCS § 971 and note and notes to § 801, and amending this section and 21 USCS §§ 830, 841, 842, 872, 876, 881, 960, 961] shall take effect 120 days after the enactment of this Act.".

RESEARCH GUIDE

Federal Procedure L Ed:

Food, Drugs, and Cosmetics, Fed Proc, L Ed §§ 35:665, 35:669.

Forms:

15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits § 61:32.

INTERPRETIVE NOTES AND DECISIONS

7. "Marijuana"

For purposes of 21 USCS § 801, et seq., marijuana is "controlled substance." United States v One 1977 36 Foot Cigarette Ocean Racer (1985, SD Fla) 624 F Supp 290.

Conviction for possession with intent to distribute "quantity of hashish, substance containing tetrahydrocannabinol" will not be overturned, despite defendants' argument that evidence was insufficient to prove that what they possessed was controlled substance, and that variance between description of charge or drug possessed in indictment and jury instructions and proof of charge or drug possessed presented at trial requires acquittal, because (1) even though actual seized substance or chemical analysis thereof was never adduced at trial, testimony by evidence technician who issued substance to undercover agents who sold it to defendants, by police officer present with drug dog at scene of arrest, and by forensic chemist who gave definitions of "hashish" and "sea-hash" was sufficient to show beyond reasonable doubt that substance seized from defendants was illegal "derivative of marijuana" under 21 USCS §§ 812, 802(16), and (2) defects in indictment and jury instructions which mistakenly characterized hashish seized as "substance containing THC" instead of "derivative of marijuana" neither confused jury nor affected any substantial right of defendants so as to require upset of conviction under 21 USCS § 841(a)(1). United States v McMahon (1987, DC Me) 673 F Supp 8.

Weight of marijuana plant stalks will not be considered for purposes of sentence enhancement under 21 USCS § 841(b)(1)(A) (vii), where marijuana was seized at stage before it was turned into readily marketable and consumable product and where 21 USCS § 802(16) excludes stalks from definition of marijuana, because under "market approach" adopted by Congress in legislative history, enhanced penalties should only apply when all marijuana seized is marketable, and such interpretation avoids inequity of penalizing individual with unmarketable marijuana same as individual with same amount of marketable marijuana. United States v Miller (1988, ED Tenn) 680 F Supp 1189.

8. "Narcotic drug"

In determining whether certain substance was opiate derivative drug enforcement agency administrator under 21 USCS § 802, may consider the substance's pharmacological effects as aspect of definition of "derivative," and administrator's rejection of "2-step" definition of derivative in which it is said that substance is derivative of another only if it can be produced from it in only one or 2 chemical operations, is sufficiently reasonable and consistent with the act's purposes to warrant judicial deference, particularly considering the administrator's expertise in area. Reckitt & Colman, Ltd. v Administrator, Drug Enforcement Admin. (1986, App DC) 788 F2d 22.

§ 811. Authority and criteria for classification of substances

(a)-(f) [Unchanged]

(g) Non-narcotic substances sold over the counter without a prescription; dextromethorphan.

(1), (2) [Unchanged]

(3) The Attorney General may, by regulation, exempt any compound, mixture, or preparation containing a controlled substance from the application of all or any part of this title if he finds such compound, mixture, or preparation meets the requirements of one of the following categories:

(A) A mixture, or preparation containing a nonnarcotic controlled substance, which mixture or preparation is approved for prescription use, and which contains one or more other active ingredients which are not listed in any schedule and which are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.

(B) A compound, mixture, or preparation which contains any controlled substance which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse.

(h) Temporary scheduling of substance in schedule I to avoid imminent public safety hazard.

(1) If the Attorney General finds that the scheduling of a substance in schedule I [21 USCS § 812] on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) relating to the Secretary of Health and Human Services, schedule such substance in schedule I [21 USCS § 812] if the substance is not listed in any other schedule in section 202 [21 § 812] or if no exemption or approval is in effect for the substance under section the Federal Food, Drug, and Cosmetic Act [21 USCS § 355]. Such an order may issued before the expiration of thirty days from—

(A) the date of the publication by the Attorney General of a notice in the F Register of the intention to issue such order and the grounds upon which such o to be issued, and

(B) the date the Attorney General has transmitted the notice required by par (4).

(2) The scheduling of a substance under this subsection shall expire at the end of on from the date of the issuance of the order scheduling such substance, except th Attorney General may, during the pendency of proceedings under subsection (a)(1 respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be requi consider, with respect to the finding of an imminent hazard to the public safety those factors set forth in paragraphs (4), (5), and (6) of subsection (c), including abuse, diversion from legitimate channels, and clandestine importation, manufactu distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued paragraph (1) to the Secretary of Health and Human Services. In issuing an order paragraph (1), the Attorney General shall take into consideration any comments su ted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

(As amended Oct. 12, 1984, P. L. 98-473, Title II, Ch V, Part B, § 509(a), 98 Stat. 2072

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1984. Act Oct. 12, 1984, in subsec. (g) added para. (3); and added subsec. (h).

RESEARCH GUIDE

Federal Procedure L Ed:

Food, Drugs, and Cosmetics, Fed Proc, L Ed §§ 35:513, 35:540-545, 35:547-548, 35:629.

Am Jur:

2 Am Jur 2d, Administrative Law § 395.

INTERPRETIVE NOTES AND DECISIONS

6. Judicial review

1. Constitutionality

21 USCS § 811(h) is permissible delegation of congressional power and is not so arbitrary that it does not comport with due process, since temporary scheduling criteria are as specific as reasonably practicable to meet imminent threat to public safety while providing sufficient guidance, absence of notice and public comment is permissible where temporary scheduling is emergency measure lasting at most 18 months, lengthy public comment would jeopardize public safety, and public hearings are held for consideration of permanent scheduling, constitutionally imposed requirement of judicial review would invalidate many statutes which preclude judicial review, harsh punishment of those distributing temporarily scheduled substances is not irrational means of reducing hazard, and determination of imminent threat to safety without scientific evaluation is reasonable basis for temporarily scheduling substances. United States v Emerson (1988, CA9 Cal) 846 F2d 541.

2. Administrative procedures

Administrative rule authorizing religious exemption for use of marijuana may not be made under authority of 21 USCS § 811; however, administrator of Drug Enforcement Administration is required to respond to petition for such a rule to inform petitioner that petition will not accepted because rule falls outside scope of Olsen v Drug Enforcement Admin. (1985, Fla) 776 F2d 267.

Previous delegation of permanent schedulir Attorney General to Administrator of DEA not delegate power to schedule drugs tempor under 21 USCS § 811(h), since procedure and of Administrator in temporary scheduling i most entirely different than permanent sched under § 811(a), and failure of Congress or A ney General to challenge or correct Admini tor's actions, or tacit approval of those actior not substitute for express delegation of autho United States v Emerson (1988, CA9 Cal) 846 541.

Guidelines under 21 USCS § 811(h) are ciently precise for delegation of legislative p to Attorney General to temporarily add substa to Schedule I of Controlled Substances Act USCS §§ 801 et seq.) if necessary to avoid in nent hazard to public safety; thus, tempo placement of 3.4 methylenedioxymethamphetar (MDMA) on Schedule I by Drug Enforcen Administration is permissible. United State Lichtman (1986, SD Fla) 636 F Supp 438.

eleven utilities which responded to the Notice argued that revocation of § 2.14 would be in the public interest.

Niagara-Mohawk Power Company stated that the same information is reported to the New York Energy Office, to the New York Public Service Commission as part of rate cases, and to the Electric Power Research Institute where it is catalogued and made available to the public. Georgia Power Company stated that the § 2.14 reports are redundant because of other reports required by other agencies. Consolidated Edison Company of New York noted its belief that reports filed under this section were not susceptible to use as a basis for Commission findings.

Effective Date

This rule is to be effective January 1, 1980.

(Federal Power Act, as amended, 16 U.S.C. 792-828c, Department of Energy Organization Act, 40 U.S.C. 7101-7352; E.O. 12009, 42 FR 46267)

In consideration of the foregoing, Part 2, Subchapter A of Chapter I, Title 18, Code of Federal Regulations is hereby amended as set forth below, effective January 1, 1980.

By the Commission.

Kenneth F. Plumb,

Secretary.

§ 2.14 [Revoked]

Section 2.14 is revoked.

[FR Doc. 79-38866 Filed 12-11-79; 8:45 am]

BILLING CODE 6450-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances; Schedule II Placement of Phenylacetone; (Phenyl-2-propanone, P2P, benzyl methyl ketone, methyl benzyl ketone)

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final Order.

SUMMARY: This is a Final Order issued by the Administrator of the Drug Enforcement Administration placing the substance, phenylacetone, also known as phenyl-2 propanone, benzyl methyl ketone, methyl benzyl ketone and P2P, into Schedule II of the Controlled Substances Act. This action results from the increasing evidence of use of phenylacetone as a major immediate chemical precursor to methamphetamine and amphetamine in their illicit clandestine synthesis. The effect of the present Order provides regulatory controls upon the manufacture, distribution, dispensing, importation and exportation of this immediate precursor to methamphetamine and amphetamine.

EFFECTIVE DATE OF SCHEDULE II CONTROL: February 11, 1980, except as otherwise provided in SUPPLEMENTARY INFORMATION Section of this Order.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Regulatory Control Division, Drug Enforcement Administration, Telephone: 202-633-1366.

SUPPLEMENTARY INFORMATION: In enacting the Controlled Substances Act in 1970, Congress provided in Section 201(e) of the Act a mechanism for allowing the Attorney General to place a drug or chemical into a schedule of control without the requirement of first obtaining a medical and scientific evaluation and recommendation from the Secretary of Health, Education, and Welfare, without having to make findings of his own on abuse and public health risk, or concerning the schedule considered, and without the need to provide an opportunity for a rulemaking hearing on the record in accordance with the Administrative Procedures Act (5 U.S.C. 551-559). In lieu of these procedures otherwise required for the traditional scheduling of drugs or other substances, Congress allowed the Attorney General to schedule a drug or substance if it was found by him to be an immediate precursor as defined in Section 102(22) of the Act. That section provides as follows:

The term "immediate precursor" means a substance—(A) Which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance; (B) Which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and (C) The control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

In establishing this alternative scheduling procedure, Congress intended to dispense with the formal, and sometimes lengthy, administrative regulatory rulemaking process in cases where the risk was that clandestine laboratories were making controlled substances with chemicals which themselves were not controlled, but which were one step removed from turning out or becoming the controlled substances illicitly manufactured. Congress recognized the need for this summary scheduling mechanism as it considered testimony provided to the House Select Committee on Crime, 91st Congress, 2nd Session, 1970-1971, (H. Rept. No. 91-1807, p. 25-6), which stated that entrepreneurs willing to set up clandestine laboratories to manufacture amphetamine and methamphetamine would find easy manufacture and realize high profits.

DEA's own investigations have documented 288 illicit methamphetamine and 45 illicit amphetamine laboratories, seized from 1975 to November 1979. More important, the illlicit methamphetamine laboratories seized in the first eleven months of this year is 106, compared with 11 seized in all of 1975. These statistics appear more alarming when one considers that DEA's enforcement effort obviously cannot account for 100% of the illicit laboratories in operation. Better control by DEA over this illicit activity could be obtained if essential ingredients used in the illicit manufacture of methamphetamine and amphetamine were regulated as are the end-products—controlled substances.

DEA's investigations have shown that at least three out of four methamphetamine laboratories seized since 1976 made, purchased or used phenylacetone in one of two synthetic methamphetamine manufacturing processes. Of those, the more popular process to make methamphetamine is the reductive amination of phenylacetone with methylamine in ethanol with aluminum foil and mercuric chloride catalysts. The second mentioned process to make methamphetamine is designated as the Leuckart synthesis where phenylacetone is heated with formic acid and methylamine and hydrolyzed with hydrochloric acid. Both processes can produce amphetamine if methylamine is simply replaced by ammonia (salts). DEA laboratories have analyzed seized samples of methamphetamine and amphetamine of illicit manufacture and have identified in those samples trace amounts of phenylacetone.

These investigations and laboratory analyses support the conclusion that most of the illicit methamphetamine and amphetamine produced by clandestine laboratories resulted from their use of phenylacetone as an essential ingredient in the process.

Other trace substances have been found in the above-mentioned methamphetamine and amphetamine samples seized and analyzed. The trace substances have been identified as by-products of syntheses and side-reactions where phenylacetone or its precursor,

phenylacetic acid, was an essential ingredient. This further establishes an additional concern that illicit laboratories, manufacturing methamphetamine and amphetamine, in some cases made, rather than purchased, their own pheylacetone. This capability drives the exposure of illicit laboratory activity deeper from law enforcement's view by replacing the marketplace transaction of purchasing phenylacetone with the hidden activity of making it.

Currently, the Drug Enforcement Administration relies upon its Precursor Liaison Program to identify excessive or suspicious sales, by manufacturers and wholesalers to questionable purchasers, of chemicals for their likely use in the illicit manufacture of controlled substances. Participating in this program are at least one manufacturer and numerous wholesalers of phenylacetone. However, participation is voluntary, and in the face of dramatically rising numbers of seizures of illicit methamphetamine and amphetamine laboratories in recent years, the obvious present need calls for requiring, not requesting, sales and distribution records and reports, security measures and import restrictions, to control this essential chemical used in the illicit manufacture of methamphetamine and amphetamine.

Such requirements would include DEA registration of purchasers and sellers of phenylacetone, and likely would result in diminishing the unhindered sales transactions now occurring.

Therefore, in view of the foregoing, the Administrator of the Drug Enforcement Administration hereby finds in accordance with Section 102(22) of the Act (21 U.S.C. 802(22)), that phenylacetone:

(1) Is the principal compound used, or produced primarily for use, in the manufacture of the Schedule II controlled substances methamphetamine or amphetamine;

(2) Is an immediate chemical intermediary used or likely to be used in the manufacture of such substances, and

(3) The control of which is necessary to prevent, curtail or limit the manufacture of such controlled substances.

Therefore, phenylacetone is an "immediate precursor" of methamphetamine and amphetamine as defined in Section 102(22) of the Act (21 U.S.C. 802(22)) and thus may be placed in Schedule II as are methamphetamine and amphetamine, without the necessity of making the findings otherwise required by Sections 201(a) and 202(b) of the Act (21 U.S.C. 811(a) and 812(b)) and without regard to the procedures otherwise required by Section 201(a) and (b) of the Act (21 U.S.C. 811(a) and (b)). Such procedures which, under the authority of Section 201(e) of the Act (21 U.S.C. 811(e)), need not be required in controlling immediate precursors, include the rulemaking procedures as set forth in the Administrative Procedures Act (5 U.S.C. 551–559), and the opportunity for a hearing on the record.

Therefore, the Administrator of the Drug Enforcement Administration hereby dispenses with issuing Notice of Proposed Rulemaking, and the opportunity for a hearing on the record, and issues this Final Order placing phenylacetone into Schedule II of the Act as an immediate precursor to methamphetamine and amphetamine, out of high regard for the need for prompt controls over phenylacetone without undue delay, which effective amphetamine and methamphetamine control demands, and in recognition of the statutory authority to regulate precursors expeditiously in any event.

Even so, the Administrator is establishing the dates on which the first Schedule II controls shall be imposed upon the legitimate manufacture, distribution, dispensing, importation, and exportation of phenylacetone to be no sooner than February 11, 1980. Within this two month period between publication of this Order and the first effective dates imposing regulatory controls for phenylacetone, all interested persons may submit comments and objections related to the issue whether, and to what extent, the required compliance by industry with Schedule II controls will or might likely hinder their legitimate manufacturing and sales activities with phenylacetone so as to outweigh the expected benefit to result from Schedule II placement of phenylacetone in curbing illicit manufacture of methamphetamine and amphetamine. The Administrator affords this opportunity for comment notwithstanding that he has earlier asked for comments by interested persons on this same issue (40 FR 47525, October 9, 1975). In response thereto, twenty-nine letters were received and the general nature of them was that phenylacetone is used in the pharmaceutical industry to make amphetamine and amphetamine-like products, and minimally in research. Most respondents stated phenylacetone was not used in their industrial processes, which included rubber processing and the manufacture of chemicals. Five opposed control citing that additional recordkeeping and security measures could be burdensome.

The Administrator, however, intends to learn how industry would currently regard this present control action, and for this reason, is offering the sixty day comment period established by this Order.

Should the Administrator receive comments or objections on the aforementioned issue which raise significant questions on the ability of industry to comply with Schedule II controls for phenylacetone, he shall immediately suspend the effectiveness of this Order as it relates to this imposition of Schedule II regulatory controls until he may reconsider that portion of this Order in light of such comments and objections so filed. Thereafter, he may reinstate, revoke or amend this Order as he determines is appropriate.

Comments should be submitted in quintuplicate to the Administrator, Drug Enforcement Administration, United States Department of Justice, 1405 I Street, NW, Washington, D.C. 20537, Attention: DEA Federal Register Representative. Dated: December 7, 1979.

Therefore, pursuant to 21 U.S.C. 811(e) and regulations of the Drug Enforcement Administration and of the Department of Justice, the Administrator of the Drug Enforcement Administration hereby orders that phenylacetone be included in Schedule II of the Act, and that § 1308.12 of Title 21, Code of Federal Regulations (CFR) be amended by creating a new subsection (f), designated *Immediate precursors*, and including therein phenylacetone as set forth below. Additionally, the Administrator takes the present opportunity to make a non-substantive change in the listing of other immediate precursors, by removing 1-phenylcyclohexylamine, and 1-piperidinocyclohexanecarbonitrile (PCC), which are immediate precursors to phencyclidine (PCP), from where they currently appear in subsection (e) (Depressants) of § 1308.12 and re-listing them in the new subsection (f), and by re-numbering Secobarbital as item (5) in § 1308.12(e).

1308.12 Schedule II.

* * * * *

(f) *Immediate precursors.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

(i) Phenylacetone—8501
Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone;

(2) Immediate precursors to phencyclidine (PCP):

(i) 1-phenylcyclohexylamine—7460
(ii) 1-piperidinocyclohexanecarbonitrile (PCC)—8603

* * * * *

Effective Dates

1. *Registration.* Any person who manufactures, distributes, dispenses, imports or exports phenlyacetone or who proposes to engage in such activities, shall submit an application for registration to conduct such activities in accordance with Parts 1301 and 1311 of Title 21 of the Code of Federal Regulations on or before February 11, 1980. Applications for registration should be sent by registered mail, return receipt requested, to: United States Department of Justice, Drug Enforcement Administration, Registration Section, P.O. Box 28083, Central Station, Washington, D.C. 20005.

2. *Security.* Phenylacetone must be manufactured, distributed, and stored in accordance with §§ 1301.71, 1301.72(a), (c), and (d), 1301.73, 1301.74(a)–(f), 1301.75(b)(c) and 1301.76 of Title 21 of the Code of Federal Regulations on or before June 12, 1980. From now until the effective date of this provision, it is expected that manufacturers and distributors of phenylacetone will initiate whatever preparations as may be necessary, including undertaking handling and engineering studies and construction programs, in order to provide adequate security for phenylacetone in accordance with DEA regulations so that substantial compliance with this provision can be met by June 12, 1980. In the event that this imposes special hardships, the Drug Enforcement Administration will entertain any justified requests for extensions of time.

3. *Labeling and Packaging.* All labels on commercial containers of, and all labeling of phenylacetone packaged after June 12, 1980, shall comply with the requirements of §§ 1302.03–1302.05 and 1302.08 of Title 21 of the Code of Federal Regulations. In the event this effective date imposes special hardships on any manufacturer, as defined in Section 102(14) of the Controlled Substances Act (21 U.S.C. 802(14)), the Drug Enforcement Administration will entertain any justified requests for an extension of time.

4. *Inventory.* Every registrant required to keep records who possesses any quantity of phenylacetone shall take an inventory pursuant to §§ 1304.11–1304.19 of Title 21 of the Code of Federal Regulations, of all stocks of such substance on hand on February 11, 1980.

5. *Records.* All registrants required to keep records pursuant to §§ 1304.21–1304.27 of Title 21 of the Code of Federal Regulations shall maintain such records on phenylacetone commencing on the date on which the inventory of such substance is taken.

6. *Reports.* All registrants required to file reports with the Drug Enforcement Administration pursuant to §§ 1304.37–1304.41 of Title 21 of the Code of Federal Regulations shall report on the inventory taken under paragraph 4 above and on all subsequent transactions.

7. *Order Forms.* The order form requirements of §§ 1305.01–1305.16 of Title 21 of the Code of Federal Regulations shall be in effect on the date which the initial inventory of this Schedule II controlled substance is taken, March 11, 1980.

8. *Quotas.* Quotas shall be established in 1980 for phenylacetone pursuant to §§ 1303.01–1303.37 of Title 21 of the Code of Federal Regulations. Applications for procurement quotas and manufacturing quotas should be submitted not later than February 11, 1980.

9. *Importation and Exportation.* All importation and exportation of phenylacetone shall, on or after February 11, 1980, be required to be in compliance with Part 1312 of Title 21 of the Code of Federal Regulations.

10. *Criminal Liability.* The Administrator, Drug Enforcement Administration, hereby orders that any activity with respect to phenylacetone as a Schedule II controlled substance not authorized by, or in violation of, the Controlled Substances Act or the Controlled Substances Import and Export Act, conducted after February 11, 1980, shall be unlawful, except that any person who is not now registered to handle phenylacetone as a Schedule II controlled substance but who is entitled to registration under such Acts may continue to conduct normal business or professional practice with phenylacetone between the date on which this Order is published and the date which he obtains or is denied registration; provided, that application for such registration is submitted on or before February 11, 1980.

11. *Other.* In all other respects, this Order is effective February 11, 1980.

Dated: December 7, 1979.

Peter B. Bensinger,
Administrator, Drug Enforcement Administration.

[FR Doc. 79-38114 Filed 12-11-79; 8:45 am]
BILLING CODE 4410-09-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 207

[Docket No. R-79-754]

Amendments to Part 207 To Change the Minimum Number of Units Required for Projects Insured Under Section 207 of the National Housing Act

AGENCY: Department of Housing and Urban Development, Office of the Assistant Secretary for Housing—Federal Housing Commissioner.

ACTION: Final rule.

SUMMARY: Sections 207.24 (a) and (b) and 207.32a of Subpart A are being amended to reflect the change from 8 to 5 in the minimum number of units required for projects insured under section 207 of the National Housing Act as authorized by the Housing and Community Development Amendments of 1978.

EFFECTIVE DATE: January 2, 1980.

ADDRESS: Rules Docket Clerk, Office of the General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, D.C. 20410.

FOR FURTHER INFORMATION CONTACT: George O. Hipps, Jr., Office of Multifamily Housing Development, Room 6128, 451 Seventh Street SW., Washington, D.C. 20410; Phone: (202) 755-5720. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: Section 207 of the National Housing Act has required that a multifamily project or a mobile home park have a minimum of eight units to be eligible for mortgage insurance. This minimum number was changed to five by the Housing and Community Development Amendments of 1978 enacted October 27, 1978. With this change, proposed projects of 5, 6, and 7 units will be eligible for mortgage insurance. Existing multifamily apartment housing projects of five to seven units will also be eligible under Part 207 pursuant to section 223(f) of the National Housing Act.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances: Rescheduling of Synthetic Dronabinol in Sesame Oil and Encapsulated in Soft Gelatin Capsules From Schedule I to Schedule II; Statement of Policy

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final Rule and Statement of Policy.

SUMMARY: This final rule is issued by the Administrator of the Drug Enforcement Administration (DEA) to transfer U.S. Food and Drug Administration (FDA) approved drug products that consist of synthetic dronabinol in sesame oil encapsulated in soft gelatin capsules from Schedule I into Schedule II of the Controlled Substances Act (CSA). Dronabinol is the synthetic equivalent of the isomer of delta-9-tetrahydrocannabinol (THC) which is the principal psychoactive substance in *Cannabis sativa L.* marijuana. This action is based on a finding that U.S. Food and Drug Administration approved drug products which contain dronabinol fit the statutory criteria for inclusion in Schedule II of the CSA. As a result of this rule, the regulatory controls and criminal sanctions of Schedule II of the CSA will apply to the manufacture, distribution, importation and exportation of dronabinol pharmaceutical products. This rule does not affect the Schedule I status of any other substance, mixture or preparation which is currently included in 21 CFR 1308.11(d)(21), Tetrahydrocannabinols. The Administrator herein also issues a statement of policy regarding review, under the public interest criteria of 21 U.S.C. 823(f) and 824(a)(4), of the DEA registrations of practitioners who distribute or dispense dronabinol for purposes at variance with the FDA approved indications for use of the approved product. A notice is published elsewhere in this isue of the **Federal Register** that withdraws the proposed rule entitled Changes in Protocol Requirements for Researchers and Prescription Requirements for Practitioners (50 FR 42184–42186, October 18, 1985).

EFFECTIVE DATE: May 13, 1986.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Drug Control Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 633–1366.

SUPPLEMENTARY INFORMATION:

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

A proposed rule was published in **Federal Register** on October 18, 1985 (50 FR 42186–42187), proposing that dronabinol in sesame oil and encapsulated in soft gelatin capsules in a drug product approved by the U.S. Food and Drug Administration be transferred from Schedule I to Schedule II of the Controlled Substances Act (21 U.S.C. 801 et seq.). Concurrently, a proposal was published which proposed changes in protocol requirements for researchers and prescription requirements for practitioners (50 FR 42184–42186). Interested persons were given until November 18, 1985, to submit comments or objections regarding each of the proposals.

Thirteen individuals or organizations availed themselves of the opportunity to comment, object or request an administrative hearing. Two organizations, Cannabis Corporation of America and National Organization for the Reform of Marijuana Laws (NORML), requested hearings. Both requests for hearings were subsequently withdrawn. Comments or objections were submitted by or on behalf of the following: Alliance for Cannabis Therapeutics, American College of Neuropsychopharmacology, American Medical Association, American Pharmaceutical Association, Arkansas Department of Health, Committee on Problems of Drug Dependence, Inc., Mr. Ansis M. Helmanis, the law offices of Kleinfeld, Kaplan and Becker, Marcos A. S. Lima, M.D., H.-G. Pars Pharmaceutical Laboratories and the Pharmaceutical Manufacturers Association.

Having considered the comments and objections presented by the above listed parties, the requirements of the Controlled Substances Act and the Convention on Psychotropic Substances (T.I.A.S. 9725, July 15, 1980), the Administrator has decided (a) to proceed with the rescheduling of dronabinol as proposed at 50 FR 42186–42187 and (b) to issue a statement of policy regarding review of the distribution or dispensing of dronabinol by practitioner registrants which deviates from approved medical use to insure compliance with the obligations of the United States as a signatory to the Convention on Psychotropic Substances. The previously proposed regulations relating to dronabinol are withdrawn elsewhere in this issue of the **Federal Register.**

(a) Transfer of FDA Approved Dronabinol Drug Products From Schedule I to Schedule II

Having considered the comments and objections presented by the above listed parties and based on the investigations and review of the Drug Enforcement Administration, with attention to the obligations of the United States under the Convention on Psychotropic Substances, and relying on the scientific and medical evaluation and recommendation of the Assistant Secretary for Health of the Department of Health and Human Services, acting on behalf of the Secretary of the Department of Health and Human Services, in accordance with 21 U.S.C. 811(b), and the Food and Drug Administration approval of a new drug application for Marinol capsules, the Administrator of the Drug Enforcement Administration, pursuant to the provisions of 21 U.S.C. 811(a), finds that:

1. Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a U.S. Food and Drug Administration approved drug product has a high potential for abuse;

2. Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a U.S. Food and Drug Administration approved drug product has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions, and

3. Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a U.S. Food and Drug Administration approved drug product may lead to severe psychological or physical dependence.

The above findings are consistent with placement of dronabinol approved drug products into Schedule II of the CSA. The transfer of the product from Schedule I to Schedule II is effective on May 13, 1986 with selected implementation dates as indicated. In the event that this imposes special hardships on any registrant, the Drug Enforcement Administration will entertain any justified request for an extention of time to comply with the Schedule II regulations. The applicable regulations are as follows:

1. *Registration.* Any person who manufactures, distributes, delivers, imports or exports a FDA approved dronabinol drug product, or who engages in research or conducts instructional activities with such a substance must be registered to conduct such activities in accordance with Parts

FR 13193), this statement of policy has been submitted for review by the Office of Management and Budget. In accordance with the provisions of 21 U.S.C. 811(a), this order to reschedule certain drug products which contain synthetic dronabinol from Schedule I to Schedule II is a formal rulemaking "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of 5 U.S.C. 556 and 557 and as such have been exempted from the consultation requirements of Executive Order 12291.

Pursuant to 5 U.S.C. 605(b), the Administrator certifies that the rescheduling of formulations which contain dronabinol, as ordered herein, will not have a significant impact upon small businesses or other entities whose interests must be considered under the Regulatory Flexibility Act (Pub. L. 96-354, September 19, 1980). This action will allow the marketing of a drug product which has been approved by the FDA.

Pursuant to the authority vested in the Attorney General by section 201(a) of the CSA [21 U.S.C. 811(a)], as redelegated to the Administrator of the Drug Enforcement Administration by 28 CFR 0.100, and for the reasons set forth above, the Administrator hereby orders that 21 CFR 1308.12 be amended as follows:

PART 1308—[AMENDED]

1. The authority citation for 21 CFR Part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b).

2. 21 CFR 1308.12 is amended by redesignating the existing paragraph (f) as paragraph (g) and by adding a new paragraph (f), reading as follows:

§ 1308.12 Schedule II.

* * * * *

(f) *Hallucinogenic substances.*

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product 7369

[Some other names for dronabinol: (6a*R*-*trans*)-6a,7,8,10a-tetrahydro-6,6,9 trimethyl-3-pentyl-6*H*-dibenzo[*b,d*]pyran 1-ol, or (-)-delta-9-(trans) tetrahydrocannabinol]

* * * * *

Dated: May 1, 1986.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 86-10724 Filed 5-12-86; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

Approval of Permanent Program Amendments From the State of Indiana Under the Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule.

SUMMARY: OSMRE is announcing the appproval of amendments to the Indiana Permanent Regulatory Program (hereinafter referred to as the Indiana program) received by OSMRE pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

On January 31, 1986, Indiana submitted amendments to its program requirements regarding civil penalties, incidental boundary revisions and use of explosives.

After providing opportunity for public comment and conducting a thorough review of the program amendments, the Director, OSMRE, has determined that the amendments meet the requirements of SMCRA and the Federal regulations. Accordingly, the Director is approving these amendments. The Federal rules at 30 Part 914 which codify decisions concerning the Indiana program are being amended to implement this action.

This final rule is being made effective immediately in order to expedite the State program amendment process and encourage States to conform their programs to the Federal standards without undue delay; consistency of the State and Federal standards is required by SMCRA.

EFFECTIVE DATE: May 13, 1986

FOR FURTHER INFORMATION CONTACT: Mr. Richard D. Rieke, Director, Indianapolis Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building and U.S. Courthouse, Room 522, 46 East Ohio Street, Indianapolis, Indiana 46204. Telephone: (317) 269-2600.

SUPPLEMENTARY INFORMATION:

I. Background

Information regarding the general background on the Indiana State program, including the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Indiana program can be found in the July 26, 1982 **Federal Register** (47 FR 32071-32108). Subsequent actions concerning the Indiana program are identified in 30 CFR 914.15 and 30 CFR 914.16.

II. Discussion of Proposed Amendment

On January 31, 1986, the Indiana Department of Natural Resources submitted to OSMRE pursuant to 30 CFR 732.17, proposed State program amendments for approval (Administrative Record No. IND 0453). The amendments modify requirements for civil penalty assessments, incidental boundary revisions and use of explosives.

OSMRE published a notice in the **Federal Register** on February 26, 1986, announcing receipt of the proposed program amendments and procedures for the public comment period and for requesting a public hearing on the substantive adequacy of the proposed amendments (51 FR 6751). The public comment period ended March 28, 1986. There was no request for a public hearing and the hearing scheduled for March 24, 1986, was not held.

III. Director's Findings

The Director finds, in accordance with SMCRA and 30 CFR 732.15 and 732.17, that the program amendments submitted by Indiana on January 31, 1986, meet the requirements of SMCRA and 30 CFR Chapter VII. Only those areas of particular interest are discussed below in the specific findings. Discussion of only those provisions for which findings are made does not imply any deficiency in any provisions not discussed.

Civil Penalties

Indiana has amended 310 IAC 12-6-11 to provide that the regulatory authority shall assess a penalty for a violation which leads to a cessation order and for notices of violation assigned 31 points or more under the point system established in 310 IAC 12-6-12.5. The rule provides that the regulatory authority may assess a penalty for 30 points or less. Under the rule, a penalty of $5000 per day shall be assessed for mining without a permit, except under certain circumstances.

Indiana has amended 310 IAC 12-6-12 to establish the requirements for assigning points for penalties based on certain factors. The factors to be considered are: The permittee's history of violations at the particular operation (up to 30 points); the seriousness of the violation for which the penalty is being assessed (up to 15 points); the degree of the permittee's negligence or fault in the violation (up to 25 points); and degree of good faith determined from the permittee's efforts to abate the violation (up to negative 30 points).

(6) 3,4 - methylenedioxy amphetamine

(7) 3,4,5-trimethoxy amphetamine

(8) Bufotenine
Some trade and other names: 3 - (β - Dimethylaminoethyl)- 5 - hydroxyindole; 3-(2-dimethylaminoethyl) - 5 - indolol; N, N - dimethylserotonin; 5 - hydroxy - N,N - dimethyltryptamine; mappine.

(9) Diethyltryptamine
Some trade and other names: N,N-Diethyltryptamine; DET.

(10) Dimethyltryptamine
Some trade or other names: DMT.

(11) Ibogaine
Some trade and other names: 7 - Ethyl - 6,6β,7,8,9,10,12,13 - octahydro - 2 - methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepino [5,4-b] indole; Tabernanthe iboga.

(12) Lysergic acid diethylamide

(13) Marihuana

(14) Mescaline

(15) Peyote
Meaning all parts of the plant presently classified botanically as *Lophophora williamsii Lemaire*, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts.

(Interprets 21 USC 812(c), Schedule I(c) (12))

(16) N-ethyl-3-piperidyl benzilate

(17) N-methyl-3-piperidyl benzilate

(18) Psilocybin

(19) Psilocyn

(20) Tetrahydrocannabinols
Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of *Cannabis*, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:
Δ1 cis or trans tetrahydrocannabinol, and their optical isomers.
Δ6 cis or trans tetrahydrocannabinol, and their optical isomers.
Δ3,4 cis or trans tetrahydrocannabinol, and its optical isomers.
(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(21) Ethylamine analog of phencyclidine
Some trade of other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, PCE.

(22) Pyrrolidine analog of phencyclidine
Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.

(23) Thiophene analog of phencyclidine
Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienylanalog of phencyclidine, TPCP, TCP.

7400
7390
7433
7434
7435
7260
7315
7360
7381
7415
7482
7484
7437
7438
7370
7455
7458
7470

(e) *Depressants.* Unless specific
excepted or unless listed in ano
schedule, any material, compo
mixture, or preparation which
tains any quantity of the follo
substances having a depressant e
on the central nervous system, inc
ing its salts, isomers, and salts of
mers whenever the existence of
salts, isomers, and salts of isome
possible within the specific chem
designation:

(1) mecloqualone

[39 FR 22141, June 20, 1974, as amende
40 FR 19813, May 7, 1975; 40 FR 28611,
8, 1975; 41 FR 4016, Jan. 28, 1976; 41
43401, Oct. 1, 1976; 42 FR 15679, Mar.
1977; 43 FR 43295, Sept.25, 1978]

§ 1308.12 Schedule II.

(a) Schedule II shall consist of th
drugs and other substances, by w
ever official name, common or u
name, chemical name, or brand
designated, listed in this section. Ea
drug or substance has been assign
the Controlled Substances Co
Number set forth opposite it.

(b) Substances, vegetable origin
chemical synthesis. Unless specifica
excepted or unless listed in another
schedule, any of the following sub
stances whether produced directly
indirectly by extraction from
stances of vegetable origin, or indep
dently by means of chemical syn
sis, or by a combination of extracti
and chemical synthesis:

(1) Opium and opiate, and any
compound, derivative, or prepara
of opium or opiate, excluding apo
phine, dextrorphan, nalbuphine,
loxone, and naltrexone, and their
spective salts, but including the follo
ing:

1 Raw opium
2 Opium extracts
3 Opium fluid extracts
4 Powdered opium
5 Granulated opium
6 Tincture of opium
7 Codeine
8 Ethylmorphine
9 Etorphine hydrochloride
10 Hydrocodone
11 Hydromorphone
12 Metopon
13 Morphine
14 Oxycodone
15 Oxymorphone
16 Thebaine

Any salt, compound, derivative,
paration thereof which is chemi-
equivalent or identical with any
substances referred to in para-
(b) (1) of this section, except
hese substances shall not include
oquinoline alkaloids of opium.
Opium poppy and poppy straw.
Coca leaves (9040) and any salt,
ound, derivative, or preparation
oca leaves, and any salt, com-
d, derivative, or preparation
ch which is chemically equivalent
dentical with any of these sub-
ces, except that the substances
not include decocainized coca
for extraction of coca leaves,
extractions do not contain co-
(9041) or ecgonine (9180).
) Concentrate of poppy straw (the
extract of poppy straw in either
id, solid or powder form which
ains the phenanthrine alkaloids of
opium poppy), 9670.
) Opiates. Unless specifically ex-
ed or unless in another schedule
of the following opiates, including
somers, esters, ethers, salts and
of isomers, esters and ethers
never the existence of such iso-
, esters, ethers, and salts is possi-
within the specific chemical desig-
on, dextrorphan excepted:

eprodine	9010
idine	9020
amide	9800
drocodeine	9120
enoxylate	9170
anyl	9801
adone	9226
methorphan	9210
rphinol	9220
zocine	9240
(-)	
adone	9250
adone-intermediate, 4-cyano-2-dimeth- 4,4-diphenyl butane	9254
amide-intermediate, 2-methyl-3-morpho- 1-diphenylpropane-carboxylic acid	9802
idine (meperidine)	9230
idine-intermediate-A, 4-cyano-1-methyl- ylpiperidine	9232
idine-intermediate-B, ethyl-4-phenylpi- e-4-carboxylate	9233
idine - Intermediate - C, 1-methyl- 4 - piperidine- 4 -carboxylic acid	9234
azocine	9715
hodine	9730
methorphan	9732
morphan	9733

Stimulants. Unless specifically
pted or unless listed in another
dule, any material, compound,
mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers	1100
(2) Methamphetamine, its salts, iso- mers, and salts of its isomers	1105
(3) Phenmetrazine and its salts	1631
(4) Methylphenidate	1724

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital	2125
(2) Methaqualone	2565
(3) Pentobarbital	2270
(4) Phencyclidine	7471
(5) Phencyclidine immediate precursors:	
(a) 1-phenylcyclohexylamine	7460
(b) 1-piperidinocyclohexanecarbonitrile(PCC)	8603
(6) Secobarbital	2315

[39 FR 22142, June 20, 1974, as amended at 40 FR 6780, Feb. 14, 1975; 40 FR 10456, Mar. 6, 1975; 41 FR 26568, June 28, 1976; 41 FR 43401, Oct. 1, 1976; 42 FR 15680, Mar. 23, 1977; 43 FR 21325, May 17, 1978]

§ 1308.13 Schedule III.

(a) Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(40) Properidine 9644
(41) Propiram 9649
(42) Racemoramide 9645
(43) Trimeperidine 9646

(c) *Opium derivatives.* Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine 9319
(2) Acetyldihydrocodeine 9051
(3) Benzylmorphine 9052
(4) Codeine methylbromide 9070
(5) Codeine N-Oxide 9053
(6) Cyprenorphine 9054
(7) Desomorphine 9055
(8) Dihydromorphine 9145
(9) Drotebanol 9335

(10) Etorphine (except hydrochloride salt) 9056
(11) Heroin 9200
(12) Hydromorphinol 9301
(13) Methyldesorphine 9302
(14) Methyldihydromorphine 9304
(15) Morphine methylbromide 9305
(16) Morphine methylsulfonate 9306

(17) Morphine-N-Oxide 9307
(18) Myrophine 9308
(19) Nicocodeine 9309
(20) Nicomorphine 9312
(21) Normorphine 9313
(22) Pholcodine 9314
(23) Thebacon 9315

(d) *Hallucinogenic substances.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):

(1) 4-bromo-2,5-dimethoxy- amphetamine 7391
Some trade or other names: 4 - bromo - 2,5 - dimethoxy - α-methylphenethylamine; 4-bromo-2,5-DMA.

(2) 2,5-dimethoxyamphetamine 7396
Some trade or other names: 2,5 - dimethoxy - α - methylphenethylamine; 2,5-DMA.

(3) 4-methoxyamphetamine 7411
Some trade or other names: 4-methoxy - α - methylphenethylamine; paramethoxyamphetamine, PMA.

(4) 5 - methoxy - 3,4 - methylenedioxy- amphetamine 7401

(5) 4 - methyl -2,5 - dimethoxy - amphetamine.
Some trade and other names: 4 - methyl - 2,5 - dimethoxy-α - methylphenethylamine; "DOM"; and "STP"

(6) 3,4 - methylenedioxy amphetamine .....

(7) 3,4,5-trimethoxy amphetamine .....

(8) Bufotenine .....
Some trade and other names: 3 - (β - Dimethylaminoethyl)- 5 - hydroxyindole; 3-(2-dimethylaminoethyl) - 5 - indolol; N, N - dimethylserotonin; 5 - hydroxy - N,N - dimethyltryptamine; mappine.

(9) Diethyltryptamine .....
Some trade and other names: N,N-Diethyltryptamine; DET.

(10) Dimethyltryptamine .....
Some trade or other names: DMT.

(11) Ibogaine .....
Some trade and other names: 7 - Ethyl - 6,6β,7,8,9,10,12,13 - octahydro - 2 - methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepino [5,4-b] indole; Tabernanthe iboga.

(12) Lysergic acid diethylamide .....

(13) Marihuana .....

(14) Mescaline .....

(15) Peyote .....
Meaning all parts of the plant presently classified botanically as *Lophophora williamsii Lemaire*, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts.

(Interprets 21 USC 812(c), Schedule I(c) (12))

(16) N-ethyl-3-piperidyl benzilate .....

(17) N-methyl-3-piperidyl benzilate .....

(18) Psilocybin .....

(19) Psilocyn .....

(20) Tetrahydrocannabinols .....
Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of *Cannabis*, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:
Δ1 cis or trans tetrahydrocannabinol, and their optical isomers.
Δ6 cis or trans tetrahydrocannabinol, and their optical isomers.
Δ3,4 cis or trans tetrahydrocannabinol, and its optical isomers.
(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(21) Ethylamine analog of phencyclidine .....
Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, PCE.

(22) Pyrrolidine analog of phencyclidine .....
Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.

(23) Thiophene analog of phencyclidine 7470
Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

Mecloqualone 2572

[39 FR 22141, June 20, 1974, as amended at 40 FR 19813, May 7, 1975; 40 FR 28611, July 8, 1975; 41 FR 4016, Jan. 28, 1976; 41 FR 43401, Oct. 1, 1976; 42 FR 15679, Mar. 23, 1977; 43 FR 43295, Sept. 25, 1978]

§ 1308.12 Schedule II.

(a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number set forth opposite it.

(b) Substances, vegetable origin or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, naloxone, and naltrexone, and their respective salts, but including the following:

Raw opium 9600
Opium extracts 9610
Opium fluid extracts 9620
Powdered opium 9639
Granulated opium 9640
Tincture of opium 9630
Codeine 9050
Ethylmorphine 9190
Etorphine hydrochloride 9059
Hydrocodone 9193
Hydromorphone 9150
Metopon 9260
Morphine 9300
Oxycodone 9143
Oxymorphone 9652
Thebaine 9333

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (b) (1) of this section, except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves (9040) and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine (9041) or ecgonine (9180).

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy), 9670.

(c) Opiates. Unless specifically excepted or unless in another schedule any of the following opiates, including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan excepted:

(1) Alphaprodine 9010
(2) Anileridine 9020
(3) Bezitramide 9800
(4) Dihydrocodeine 9120
(5) Diphenoxylate 9170
(6) Fentanyl 9801
(7) Isomethadone 9226
(8) Levomethorphan 9210
(9) Levorphanol 9220
(10) Metazocine 9240

(11) Methadone 9250
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane 9254
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid 9802
(14) Pethidine (meperidine) 9230
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine 9232
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate 9233
(17) Pethidine - Intermediate - C, 1-methyl- 4 - phenylpiperidine- 4 -carboxylic acid 9234
(18) Phenazocine 9715
(19) Piminodine 9730
(20) Racemethorphan 9732
(21) Racemorphan 9733

(d) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers	1100
(2) Methamphetamine, its salts, iso- mers, and salts of its isomers	1105
(3) Phenmetrazine and its salts	1631
(4) Methylphenidate	1724

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such *salts, isomers, and salts of isomers* is possible within the specific chemical designation:

(1) Amobarbital	2125
(2) Methaqualone	2565
(3) Pentobarbital	2270
(4) Phencyclidine	7471
(5) Secobarbital	2315

(f) *Immediate precursors.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

(i) Phenylacetone—8501

Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone: methyl benzyl ketone:

(2) Immediate precursors to phencyclidine (PCP):

(i) 1-phenylcyclohexylamine—7460

(ii) 1-piperidinocyclohexanecarbonitrile (PCC)—8603

[39 FR 22142, June 20, 1974, as amended at 40 FR 6780, Feb. 14, 1975; 40 FR 10456, Mar. 6, 1975; 41 FR 26568, June 28, 1976; 41 FR 43401, Oct. 1, 1976; 42 FR 15680, Mar. 23, 1977; *43 FR 21325, May 17, 1978; 44 FR 71823,* Dec. 12, 1979]

§ 1308.13 Schedule III.

(a) Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Those compounds, mixtures, or preparations in dosage unit form containing any stimulant substances listed in schedule II which compounds, mixtures, or preparations were listed on August 25, 1971, as excepted compounds under § 308.32, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except that it contains a lesser quantity of controlled substances	[illegible]
(2) Benzphetamine	1228
(3) Chlorphentermine	1645
(4) Clortermine	1647
(5) Mazindol	1605
(6) Phendimetrazine	1615

(c) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any compound, mixture or preparation containing:	
(i) Amobarbital	2125
(ii) Secobarbital	2315
(iii) Pentobarbital	2270
or any salt thereof and one or more other active medicinal ingredients which are not listed in any schedule.	
(2) Any suppository dosage form containing:	
(i) Amobarbital	2125
(ii) Secobarbital	2315
(iii) Pentobarbital	2270
or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository.	

(3) Any substance which contains any quantity of a derivative of barbituric acid or any salt thereof	2100
(4) Chlorhexadol	2510
(5) Glutethimide	2550
(6) Lysergic acid	7300
(7) Lysergic acid amide	7310
(8) Methyprylon	2575
(9) Sulfondiethylmethane	2600
(10) Sulfonethylmethane	2605
(11) Sulfonmethane	2610

(d) Nalorphine 9400.

(e) *Narcotic Drugs.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium	9803
(2) Not more than 1.8 grams of codeine per 100 *milliliters or not more than 90 milligrams per* dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts	9804
(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium	9805
(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts	9806
(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts	9807
(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts	9808
(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts	9809
(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts	9810

[39 FR 22142, June 20, 1974, as amended at 41 FR 43401, Oct. 1, 1976; 43 FR 3359, Jan. 25, 1978; 44 FR 40888, July 13, 1979]

§ 1308.14 Schedule IV.

(a) Schedule IV shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Narcotic drugs.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(1) Not more than 1 milligram of difenoxin (DEA Drug Code No. 9168) and not less than 25 micrograms of atropine sulfate per dosage unit.

(c) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Barbital	2145
(2) Chloral betaine	2460
(3) Chloral hydrate	2465
(4) Chlordiazepoxide	2744
(5) Clonazepam	2737
(6) Clorazepate	2768
(7) Diazepam	2765
(8) Ethchlorvynol	2540
(9) Ethinamate	2545
(10) Flurazepam	2767
(11) Lorazepam	2885
(12) Mebutamate	2800
(13) Meprobamate	2820
(14) Methohexital	2264
(15) Methylphenobarbital (mephobarbital	2250
(16) Oxazepam	2835
(17) Paraldehyde	2585
(18) Petrichoral	2591
(19) Phenobarbital	2285
(20) Prazepam	2764

(d) *Fenfluramine.* Any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

(1) Fenfluramine	1670

(e) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which con-

60-059 O—80——7

INSTRUCTION NO. 1

You are instructed that under the laws of the State of Utah Phenyl-2-Propanone, or P-2-P, is not a controlled substance. However, if a substance has been lawfully made a controlled substance under the Federal Controlled Substances Act, then it is controlled under the Utah Controlled Substances Act.

Therefore, if the State proves beyond a reasonable doubt:

A: 1. That the United States Attorney General by rule scheduled the substance P-2-P or Phenyl-2-Propanone as a controlled substance;

2. That the United States Attorney General made a finding, after a hearing in accordance with his rulemaking procedures, which at least allowed for a hearing on the record, that P-2-P has a potential for abuse;

3. That the United States Attorney General found that the substance P-2-P:
   a. Has a potential for abuse less than the drugs on schedules I and II;
   b. Has a currently accepted medical use in treatment in the United States; and
   c. Abuse of the substance may lead to moderate or low physical dependence or high psychological dependence; and

4. That notice of said action was properly published in in the Federal Register and the Code of Federal Regulations.; or

B: That the United States Attorney General properly found, pursuant to a hearing and in accordance with his rulemaking authority, that P-2-P was an immediate precurser in that :
   a.the Attorney General has found it to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;
   b. It is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance; and

c. The control of which is is necessary to prevent curtail, or limit the manufacture of such controlled substance.

then you may determine that the substance P-2-P or Phenyl-2-Propanone is a controlled substance under Utah Law.

INSTRUCTION NO. 5

You are instructed that Phenyl-2-Propanone or P2P is a controlled substance under the laws of the State of Utah.

IN THE FIRST JUDICIAL DISTRICT COURT, BOX ELDER COUNTY

STATE OF UTAH

STATE OF UTAH Plaintiff	)	
VS	)	MEMORANDUM DECISION
	)	CASE NO. 881000063
MICHAEL LEWIS GREEN AKA JAMES ALVIN DOUGLAS	)	
Defendant	)	

The Defendant has filed Motions to Suppress based upon three separate grounds. The first that the evidence obtained pursuant to the search should be disallowed because of invalidity of the warrant. The argument is analyzed under several different criteria by the Defendant. That the search warrant was invalid, the affidavit contained insufficient information on which probable cause could be established, that it contained mis-statements which should be excised there-from, and that it omitted information, which had it been supplied, would have negated any probable cause.

The Defendant argues the language in the affidavit is that of the Sheriff's Deputy rather than of the confidential informant. Though the language was not an exact quote of the confidential informant, the confidential informant generally stated that he believed the premises contained the hidden lab in the garage and he believed it to be producing some kind of an illegal substance.

That, together with the information supplied from the Sheriff's investigator and Mr. Art Terkelson, would lead to the same conclusion and statement that the affiant believed that there to be a clandestine lab, producing legal substances located in the residence of Perry.

The alleged mis-statements as characterized by the Defendant, in the Courts opinion, should not be excised from the affidavit and even if they were, there is still sufficient circumstantial information to support probable cause.

The omission of information regarding the previous owner of the home, Mr. Bob Wendell, in this Courts opinion would not affect the contents of the affidavit against the State. Whether the previous occupant of the house was a chemistry teacher of high school is of little relevance to the alleged use of the premises at the time of question.

The next basis for attack by the Defendant, is that the information supplied to the Court was stale, and therefore invalidates the issuance of the warrant. Only part of the information was older, in fact after receiving the information from the confidential informant, the Sheriff's detectives continued to observe the premises for a substantial period thereafter. If in fact the lab at the premises were used as a clandestine lab, it was not the kind of operation that would likely cease and become stale in a matter of a few months. Secondly, the continued surveilance up until the first part of September, shortly before the issuance of the warrant would substantiate the fact that the information was not stale. The follow-up surveilance and observation of the premises by the Sheriff's Office would indicate caution on their part to not seek a warrant based only upon the information supplied by the confidential informant but rather as supported the investigation.

The last basis for attack on the warrant is the officers exercise of improper zeal in execution of the warrant. The friend of the Defendant and co-occupant of the house may have standing to argue constitutional rights before this Court. Certainly this Defendant has no standing to argue any violations of her constitutional rights.

Taking the Defendant back to the premises upon his arrest rather than to the police station or otherwise, appears under the circumstances of this case to be the proper exercise of caution both for the protection of the Defendant and for the police officers. Most importantly, there appears to be nothing in the action of the police officer which this Court construes to be malicious. Therefore the Motion to Suppress the evidence based upon the alleged faulty search warrant are denied.

The next basis for the Motion to Suppress, is that Andre Pommier, the confidential informant was a Government employee or agent when he discovered the lab and therefore breached the Defendants constitutional rights. This Court indicated at the time of the hearing that its not convinced that Mr. Pommier was an agent of the State, nor that he was acting as an agent at the time he was in the Defendants home and conducting, which has been characterized as, investigations. There is nothing to show that his "investigations" had anything to do with his positions as voluntary fireman or Deputy Fire Marshall.

The Defendant would suggest that because of Mr. Pommier's illegal activity, the State therefore should be precluded from using the evidence. The State on the other hand suggests that Mr. Pommier should be commended as a concerned citizen. This Court cannot condone Mr. Pommier's activity which was an apparent tresspass of the Defendants rights. That trespass, however, does not vitiate the State's ability to use the information even though obtained by unlawful activity by Mr. Pommier.

The next Motion to Suppress by the Defendant is that certain chemicals were destroyed. This situation usually arises when the evidence which is being tested is destroyed during the testing. In this case, the evidence which was tested has not been destroyed and there is sufficient left for examination by the Defendant. The Defendant argues that other chemicals were destroyed and therefore all the evidence should be suppressed. To the contrary, evidence which was destroyed was considered to create a hazard and the State had no facilities in which to store the same. Identities of those chemicals appears not to be an issue here and those chemicals which are an issue and which were tested and could have been re-tested by the Defendant.

In addition to all of the above, there appears no malice or bad faith exercised on behalf of the State in destruction of that evidence, and therefore the Motion to Suppress by the Defendant is hereby denied.

Dated this 1st day of March, 1989.

BY THE COURT:

Gordon J. Low
District Judge

hold over; he may resign. Tooele County v. De La Mare, 90 U. 46, 59 P. 2d 1155, 106 A. L. R. 182, superseding 90 U. 23, 39 P. 2d 1051, and following State ex rel. Stain v. Christensen, 84 U. 185, 35 P. 2d 775.

Indefinite term of office.

General rule that term for which officer is elected shall be fixed before election is inapplicable where voters, at same election, vote on officer and also on proposed constitutional amendment extending term of that office. Snow v. Keddington, 113 U. 325, 195 P. 2d 234.

Collateral References.

Beginning or expiration of term of elective office where no time fixed by law, 80 A. L. R. 1290, 135 A. L. R. 1173.

Power of board to make appointment to office or contract extending beyond its own term, 149 A. L. R. 336.

"Until" as word of inclusion or exclusion where term of office runs until a specified day, 16 A. L. R. 1100.

Sec. 10. [Oath of office.]

All officers made elective or appointive by this Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity. ["]

Compiler's Notes.

The quotation marks at the end of this section have been carried in brackets in all compilations since Revised Statutes of 1898.

Comparable Provision.

Montana Const., Art. XIX, § 1.

Cross-Reference.

Oaths of officers, 52-1-1.

Bond required in addition to oath.

Statute requiring state treasurer to give bond is not unconstitutional on ground that legislature could not add to requirement in this section. State ex rel. Stain v. Christensen, 84 U. 185, 35 P. 2d 775.

Formal ritual unnecessary.

A deputy county recorder took the oath of office, required by this section, by his signing of oath form duly notarized by a deputy county clerk (a person duly authorized to administer oaths) although he did not go through some formal ritual, with the raising of his right hand. State v. Mathews, 13 U. (2d) 391, 375 P. 2d 392.

Supreme Court justices required to take oath.

Judges of the Supreme Court subscribe to this oath when entering upon their duties as justices thereof. Critchlow v. Monson, 102 U. 378, 131 P. 2d 794. For sequel to this case, see State ex rel. Jugler v. Grover, 102 U. 459, 132 P. 2d 125.

Collateral References.

Officers⊂⊃36(1).
67 C.J.S. Officers § 38.

Member of grand or petit jury as officer within constitutional or statutory provisions in relation to oath or affirmation, 118 A. L. R. 1098.

ARTICLE V

DISTRIBUTION OF POWERS

Section.
1. [Three departments of government.]

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions

appertaining to either of the others, except in the cases herein expressly directed or permitted.

Comparable Provision.

Montana Const., Art. IV, § 1.

Cross-References.

Executive department, Const. Art. VII.
Judicial department, Const. Art. VIII.
Legislative department, Const. Art. VI.
Municipal powers not delegable, Const. Art. VI, § 29.

Crimes and criminal procedure.

This section precludes the Supreme Court from declaring any conduct a crime, no matter how morally reprehensible it may be, where it is not so declared by the legislature. State v. Johnson, 44 U. 18, 137 P. 632.

The Indeterminate Sentence Law, 77-35-20, is not violative of this section as depriving the court of any constitutional power of authority guaranteed to it. Mutart v. Pratt, 51 U. 246, 170 P. 67.

Declaratory judgments.

Quoting from Anderson on Declaratory Judgments, § 8, p. 27, "A controversy, in the sense in which the word is used in the Constitution in defining judicial power, particularly of the federal courts, must be one that is appropriate for judicial determination as distinct from a difference or dispute of hypothetical or abstract character or from one which is academic or moot, but must be definite and concrete, touching the legal relation of the parties in adverse legal interest, and must be a real substantial controversy admitting of specific relief through a decree conclusive in character as distinct from an opinion or advice of what the law would be on a hypothetical state of facts." Lyon v. Bateman, 119 U. 434, 228 P. 2d 818.

Declaratory statutes affecting existing judgments.

After court has interpreted or construed statute on trial of case, and rendered judgment, legislature cannot affect judgment by declaratory or explanatory statute, giving statute, under which judgment was rendered, different construction. In re Handley's Estate, 15 U. 212, 49 P. 829, 62 Am. St. Rep. 926, on motion for rehearing in 7 U. 49, 24 P. 673, appeal dismissed on jurisdictional grounds, 151 U. S. 443, 38 L. Ed. 227, 14 S. Ct. 386.

When court construes statute, involved in case, and holds that it has certain effect and renders judgment accordingly, legislature cannot thereafter declare that statute, as to case in which judgment was rendered, had effect other than that declared by court. In re Handley's Estate, 15 U. 212, 49 P. 829, 62 Am. St. Rep. 926, on motion for rehearing in 7 U. 49, 24 P. 673, appeal dismissed on jurisdictional grounds, 151 U. S. 443, 38 L. Ed. 227, 14 S. Ct. 386.

Delegation of judicial power.

Irrigation District Act of 1909, as amended by Laws of 1911, did not violate this section on ground that judicial powers were conferred upon certain persons. State ex rel. Lundberg v. Green River Irr. Dist., 40 U. 83, 119 P. 1039.

Uniform Land Registration Act of 1917 was not invalid as attempting to confer judicial authority on county clerks of state as ex officio registrars of title in violation of this provision. Ashton-Jenkins Co. v. Bramel, 56 U. 587, 192 P. 375, 11 A. L. R. 752.

Workmen's Compensation Act is not invalid because it delegates to industrial commission the power to hear, consider, and determine controversies between litigants as to ultimate liability, or their property rights. Utah Fuel Co. v. Industrial Comm., 57 U. 246, 194 P. 122.

While term "judicial power" embraces all suits and actions whether public or private, it does not necessarily include the power to hear and determine matters not necessarily in nature of suit or action between parties and does not apply to those cases where the judgment is exercised or is to be exercised as a mere incident to execution of a ministerial power or duty. Citizens' Club v. Welling, 83 U. 81, 27 P. 2d 23.

Industrial commission is an administrative body and has no power to perform judicial acts or exercise judicial functions, and hence has no jurisdiction of action to recover additional compensation for employees employed on public works on ground that they were not paid prevailing wage rate. Logan City v. Industrial Comm., 85 U. 131, 38 P. 2d 769.

Order of public service commission denying a certificate of public convenience and necessity is not an exercise of a judicial function within meaning of this section. Mulcahy v. Public Service Comm., 101 U. 245, 117 P. 2d 298.

Statutes empowering the secretary of state to revoke charters of social clubs for violating law are valid as against the contention that judicial power is conferred upon the secretary of state. Citizens' Club v. Welling, 83 U. 81, 27 P. 2d 23; Kent Club v. Toronto, 6 U. (2d) 67, 305 P. 2d 870.